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A
COLLECTION
OF
Acts and Records of Parliament,
WITH
Reports of Cases
ARGUED AND DETERMINED
IN THE
Courts of Law and Equity,
RESPECTING
T I T H E S.

By HENRY GWILLIM, Esq.
ONE OF HIS MAJESTY'S JUDGES
OF THE SUPREME COURT AT MADRAS.

IN FOUR VOLUMES.
VOL. II.

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of land in *Exminster* in fee; of which 300 acres of land, time out of mind, the tithes of grain, growing thereupon, were payable unto the rector of the church aforesaid, or his farmer or deputy, when they were sown: that the defendant being seised of the messuage and 300 acres of land in form aforesaid, 10 *Mu.* 5 *Car.* did sow 130 acres of them with grain, viz. 30 acres with wheat, 30 acres with rye, 30 acres with barley, 30 acres with oats, and 10 acres with beans and peas; which 130 acres so sown within the space of 40 years last past did use and ought to pay tithes of corn unto the rector of the church aforesaid, his farmer or deputy: that the defendant being the subject of the king, and knowing the tenth part of the several grains to belong unto the plaintiff, on the last day of *Sept.* 5 *Car.* at *Exminster* aforesaid, the aforesaid several tithes of grain to the value of 30 l. growing upon the said 130 acres of land, did not divide or sever from the nine parts, nor did otherwise agree with the plaintiff, being rector of the church aforesaid: but that the defendant, being a subject of the king, on the last day of *Sept.* 5 *Car.* the tithes aforesaid of the said 130 acres in form aforesaid sown, did take and carry away against the form of the statute; by which an action hath accrued to the plaintiff to require of the defendant 90 l. for the treble value of the tithes aforesaid, according to the form of the statute so made and provided; and he the defendant hath not paid the said 90 l. (although thereunto required). To the damage of the plaintiff of 20 l.

The defendant pleadeth *non debet*.

The jury find, as to the taking and carrying away of the several tithes growing in and upon 100 acres, that *H. 8.* was seised of the rectory appropriate of *Crediton* in the diocese of *Exeter* in the county of *Devon* in fee, and of the advowson of the parish church of *Exminster* in the same county of *Devon* in the same diocese as of fee and right, in right of his crown of *England*: and that the church of *Exminster* then, and time out of mind, was a church presentative, and that the church of *Exminster* was full of the person of *John Hickes* clerk, then incumbent of the same church: and that *John Hickes* and all his predecessors, rectors of the same church, time out of mind had cure of souls within the said parish of *Exminster*: that the church became void by the death of *John Hickes*, and *H. 8.* presented one *William Leveston* to the same church being void, who was admitted, instituted, and inducted: that *H. 8.* died seised of the said advowson, and the same descended to *E. 6.*: that the king, under his great seal made certain letters patent, bear-

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2. Whether an appropriation in default of the endowment of a vicar be good.

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ing date 2 Apr. 1 E. 6. unto Gilbert Gale, John Bodley, Robert Trowbridge, Robert Davy, John Holcombe, William Shilpton, Thomas Harris, John Wells, John Helyer, James Mortimer, John Atwell, and William Moxley, being laymen, to be governors of the hereditaments and goods of the church of *Crediton*, otherwise called *Kirton*, in the county of *Devon*; the tenor whereof followeth.

EDWARDUS sextus, &c. Sciatis, quod nos, tam ad divini cultus augmentum, ac bonorum, catallorum et hæreditamentorum ecclesiæ parochialis de *Crediton*, &c. meliorem preservationem et gubernationem, et ad puerorum eruditionem, quam pro aliis causis et considerationibus, nos ad quosdam subditos nostros inhabitantes ejusdem parochiæ de *Crediton* pro universo commodo et communi utilitate omnium et singulorum inhabitantium ejusdem parochiæ incorporand' et in unum corpus erigend' specialiter movend' et instigand', volumus et ex certâ scientiâ et mero motu nostris, pro nobis hæredibus et successoribus nostris per præsentem concedimus dictis inhabitantibus parochiæ prædictæ quod de cætero in perpetuum sint infra eandem parochiam de inhabitantibus ejusdem ecclesiæ pro tempore existent' duodecim gubernatores hæreditamentorum et bonorum ecclesiæ de *Crediton*. Quorum quidem gubernatorum tres esse volumus semper ex parte villatæ seu hamlettæ de *Sampford* infra eandem parochiam; et quod idem duodecim gubernatores in re facto et nomine in posterum sint unum corpus de se in perpetuum per nomen duodecim gubernatorum hæreditamentorum et bonorum ecclesiæ de *Crediton* alias *Kirton* in dicto comitatu *Devon* incorporat' et erect', ac ipsos duodecim gubernatores hæreditamentorum et bonorum ecclesiæ de *Crediton* alias *Kirton* per præsentem incorporamus ac unum corpus corporatum per idem nomen in perpetuum duraturum realitèr et ad plenum creamus, erigimus, ordinamus, facimus et constituimus per præsentem—to have a perpetual succession—persons able and capable to purchase—to have a common seal—to sue and to be sued by that name. And the king doth institute the aforesaid persons to be the twelve present governors, and if any of them die or depart out of the parish of *Crediton* with their families, to choose any other of the same inhabitants in his or their place within one month after, so that three of them shall always be of the town of *Sampford*. And he doth found a grammar school in the parish of *Crediton*, of one master, and that it be called The king's new grammar-school of *Crediton*, and that the same master be chosen by the twelve governors from time to time after the church of *Exminster* shall become void: and that the master and his successors have perpetual succession, and be able to purchase of the governors a house for his abode and a rent of 12 l. with a clause of distress: and if

the

the master be absent by a month, then the governors to choose another. A grant unto the twelve governors of the parish church of *Crediton* and church-yard and site of the college of *Crediton*—*ac advocacionem et jus patronatûs rectoriæ ecclesiæ parochialis de Exminster in dicto comitatu Devon, necnon eandem vicariam ecclesiæ parochialis de Crediton, et dictam rectoriam et ecclesiam de Exminster, et omnia et singula maneria, &c. glebas, &c. pensiones, portiones, decimas, fructus, oblationes, ac alia jura proficua, commoditates, et emolumenta quæcumque eidem vicario ecclesiæ parochialis de Crediton aut alicui vicario inde, ac dictæ rectoriæ et ecclesiæ de Exminster seu alicui rectori inde sue eorum alicui quoquo modo spectant' et pertinent'* To hold as of our manor of *Exminster* by fealty only for all services, notwithstanding the statute of Mortmain, and the statute of the grant of First Fruits, and any other statute whatsoever.—*Et cum Willielmus Leveston clericus modo sit rector, incumbens, et canonicus possessor ecclesiæ parochialis de Exminster prædictæ, eandemque ecclesiam cum suis juribus et pertinentiis universis pacificè possideat in præsentibus, Sciatis, quòd nos de gratiâ nostrâ speciali ac ex certâ scientiâ et mero motu nostris, necnon auctoritate nostrâ regiâ supremâ et ecclesiasticâ, quâ fungimur, pro nobis heredibus et successoribus nostris, appropriamus, unimus, annectimus, et consolidamus præfatis duodecim gubernatoribus et successoribus suis in perpetuum prædictam rectoriam et ecclesiam de Exminster cum suis juribus et pertinentiis universis; ipsamque rectoriam et ecclesiam cum suis juribus et pertinentiis universis eisdem duodecim gubernatoribus et successoribus suis in proprios usus suos pro perpetuo possidend' donamus et concedimus per præsentibus, jure prædicti rectoris moderni inde durante tempore incumbentiæ suæ in eadem eidem rectori tantummodo salvo et reservato. Et ulterius volumus, ac auctoritate nostrâ prædictâ necnon ex certâ scientiâ et mero motu nostris prædictis, dedimus et concessimus, ac per præsentibus damus et concedimus, præfatis duodecim gubernatoribus hereditamentorum et bonorum ecclesiæ de Crediton in comitatu Devon, et successoribus suis, licentiam, facultatem, et plenam potestatem, quòd ipsi immediatè postquam rectoria et ecclesia de Exminster prædictâ per mortem, resignationem, seu deprivationem dicti modo rectoris et incumbentis inde, aut aliquo alio modo vacaverit, seu vacare contigerit, eandem rectoriam et ecclesiam de Exminster prædictâ, ac omnia messuagia, &c. glebas, decimas, oblationes, obventiones, pensiones, portiones, fructus, libertates, et alia hereditamenta, emolumenta, commoditates, et proficua quæcumque eidem ecclesiæ et rectoriæ de Exminster seu eorum alicui quovis modo spectantia seu pertinentia ad eorum libitum et beneplacitum sibi præfatis gubernatoribus et successoribus suis appropriare possint et valeant in per-*

1631. *petuum: et quod eidem gubernatores et successores sui eandem ecclesiam et rectoriam ac prædicta messuagia, &c. glebas, &c. in suos proprios usus habere, tenere, gaudere, et convertere valeant, et possint eis et successoribus suis; et hoc absque aliquâ præsentatione, inductione, sive admissione alicujus incumbentis vel aliquorum incumbentium ad dictam ecclesiam et rectoriam de Exminster prædictâ seu eorum alteram in posterum fieri et absque impetitione, molestatione, seu impedimento nostri, hæredum et successorum nostrorum, aut aliquorum archiepiscoporum et episcoporum vic'escheat' Justiciariorum, commissionariorum, aut aliorum officiariorum seu ministrorum nostrorum, hæredum vel successorum nostrorum quorumcunque; et absque compoto primitiis vel decimis, aut aliquo alio proinde nobis, hæredibus vel successoribus nostris; quoquo modo reddendo, solvendo, vel faciendo; statuto de terris et tenementis ad manum mortuam non ponendo, aut statuto de concessione primitiarum et decimarum nobis hæredibus et successoribus nostris de beneficiis, dignitatibus, et promotionibus spiritalibus et ecclesiasticis editis et provisio, aut aliquo alio statuto, actu, ordinatione, provisione, restrictione, vel lege, ecclesiasticâ seu temporali, in contrarium antehac facto, edito, ordinato, seu proviso, aut aliquâ aliâ re, causâ, vel materiâ quâcumque in aliquo non obstante; et absque aliquo brevi de ad quod damnum, seu aliquo alio brevi, præcepto, seu mandato nostri, hæredum et successorum nostrorum, præmissis, seu aliquo præmissorum quoquo modo prosequend' impetrand' vel fiend' et absque aliquâ inquisitione inde capiend' et in cancellariam nostram retornand'* Et ulterius sciatis, quod nos, autoritate prædictâ, pro nobis, hæredibus et successoribus nostris, concedimus ac licentiam damus, quod bene licebit præfatis duodecim gubernatoribus et successoribus suis, postquam dicta rectoria et ecclesia de Crediton prædictâ primò et proximè vacaverit, et ad manus et possessionem suam devenierit, præsentare unum clericum habilem et idoneum loci ordinario et diocæsano fore vicarium dictæ ecclesiæ de Crediton; et ita de tempore in tempus quoties eadem ecclesia de vicario ibidem vacare contigerit.—And he made a perpetual body, and to have the charge of souls in the parish of Crediton; and after the church of Exminster became void, the governors to provide a house for the vicar, and the governors to distribute reasonable sums among the poor parishioners of Crediton to be appointed by the bishop of the diocese, and to assign a rent of 20 l. for the maintenance of the vicar and his successors.—Sciatis ulterius, quod nos, de uberiori gratiâ nostrâ, ac ex certâ scientiâ et mero motu nostris, neque non autoritate nostrâ supremâ et ecclesiasticâ prædictâ, quâ fungimur, pro nobis, hæredibus et successoribus nostris, per præfatos concedimus ac licentiam damus, quod quamprimum dicta ecclesia et rectoria de Exminster vacare contigerit, aut quamprimum

nam possessorem ejusdem ecclesiæ et rectoriæ dicti duodecim gubernatores aut successores sui adepti fuerint, &c. unum clericum habilem et idoneum loci illius ordinario ad eandem ecclesiam sic vacantem nominabunt et presentabunt; et ita de tempore in tempus in perpetuum quoties eadem de vicario vacare contigerit. Qui quidem clericus sic nominatus et presentatus, ac per dictum ordinarium loci illius canonicè institutus et inductus, nominabitur et erit perpetuus vicarius ejusdem ecclesiæ de Exminster.— He made the perpetual vicar a body corporate and to have perpetual succession and the charge of souls within the parish of *Exminster*—The governors to provide a house for him, and to distribute among the poor parishioners there a reasonable sum, and to pay him 12 l. by the year, and power given to the governors to grant 12 l. by the year, and a house unto the vicar of *Exminster* and his successors—a discharge of the vicars of *Crediton* and *Exminster* of the first fruits—

That *Edward* the sixth died, queen *Mary* being his sister and heir: that queen *Mary* died, queen *Elizabeth* being her sister and heir: that on the last day of *September* 1583, *Wm. Leveston* the rector of the church of *Exminster* died; when the governors entered into the rectory: that on the 30th of *October* 1583 the governors presented one *Wm. Randall* to the vicarage of *Exminster* unto the bishop of *Exeter*, who was admitted, instituted, and inducted: that *Wm. Randall* until 1 *June* 1625 had a mansion-house by the appointment of the governors, and after the 1st of *June* he had a house by virtue of a gift made by the governors under their common seal, and had also a pension of 12 l. by the year granted unto him and his successors: that on the 10th of *Feb.* 4 *Car.* *Wm. Randall* died: and the jury find that there was not any other endowment until the 1st of *June* 1625: that queen *Elizabeth* died, king *James* being her cousin and heir: that *Valentine* late bishop of *Exeter* chosen to the bishoprick of *Exeter*—that on the 29th *Dec.* 19 *Ja.* there was a grant *in commendam* unto the bishop of *Exeter*, who was afterwards consecrated: that on 13 *July*, 22 *Ja.* the king presented the bishop of *Exeter* unto the rectory of *Exminster*, who was instituted by the archbishop of *Canterbury*, and inducted by *Wm. Randall* clerk by the commandment of the archbishop: that the value of the benefice is 33 l.: that king *James* died, king *Charles* being his son and heir: that 5 *Jan.* 22 *Car.* *Valentine* bishop of *Exeter* died: that 7 *Jan.* 3 *Car.* king *Charles* presented one *Wm. Morden* to the church of *Exminster*, who was admitted, instituted, and inducted: that 19 *March*, 4 *Car.* *Wm. Morden* died seized of the

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the rectory *prout lex postulat*: that 16 March, 4 Car. Wm. Randall died: that *Joseph Hall* was elected bishop of *Exeter*; that the governors presented one *William Randall* to the vicarage of *Exminster* under their common seal: that 24 March, 4 Car. the king presented *Thomas Alden* unto the rectory of *Exminster*, who was admitted, instituted, and inducted; and the presentation was by lapse or any other title; be the church void: that 10 May, 5 Car. the defendant *Henry Tothill* sowed 21 acres of rye, 4 acres of barley, 22 acres of beans and peas, and did not set forth the 10th part from the nine parts, nor agree with the plaintiff, but on the last day of September 5 Car. took and carried them away against the form of the statute; and that the tenth part so taken and carried away by the defendant was worth 8 l. the treble value whereof is 24 l. And if upon the whole matter the court shall think that the defendant doth owe 24 l. then they find that he oweth 24 l.; and if not, then not: and as to the 66 l. of the 10 l. they find that he doth not owe the 66 l. The case is shortly this.

King *Edward 6.* being seised of the advowson of the church of *Exminster* in the county of *Devon* which is presentative, doth by his letters patent 2 Apr. 1 E. 6. create the corporation of the twelve governors of the goods and hereditaments of the church of *Crediton*, the same corporation consisting all of laymen; and, by the same letters patent, the church at that time being full by the presentation, admission, institution, and induction of one *Wm. Leveston*, doth grant the advowson of the same church unto the twelve governors and their successors; and reciting, that *Wm. Leveston* is rector of the church, doth appropriate the rectory and church of *Exminster* unto the twelve governors and their successors, and doth grant the rectory and church unto them and their successors for their proper use; and when the church of *Exminster* shall become void by the death, resignation, or deprivation of *Wm. Leveston*, that the said governors and their successors may appropriate the said rectory and church, and convert it to their proper use, and hold and enjoy it accordingly; and this without any presentation, admission, or induction of any incumbent to the said church, and without the impediment or hindrance of the king, his heirs and successors, or any other, and without paying any first fruits or tenths: and when the church of *Exminster* shall become void, doth give power to nominate and present a clerk unto the church, who shall be a perpetual vicar of that church; and doth give power to assign a house, and 12 l. by the year rent, unto the vicar and his successors for his maintenance. On 30 Sept. 25 Eliz.

25 *Eliz.* *Wm. Leveson*, the incumbent, dieth. On 30 *Oct.* 25 *Eliz.* the twelve governors under their common seal present one *Wm. Randall* to the vicarage of *Exminster*, who is admitted, instituted, and inducted, and hath a house assigned unto him, and the rent of 12 l. by the year paid unto him. On 13 *July*, 22 *Ja.* the king presents *Valentine Davye* bishop of *Exeter*, who hath power to take a church *in commendam*, unto the church, who is admitted, instituted, and inducted. On 11 *June* 1625 the governors endow the vicar of *Exminster* and his successors with a house and 12 l. rent, according unto the purport of the letters patent. On 5 *June*, 2 *Car.* the bishop of *Exeter* dieth. On 7 *June*, 3 *Car.* the king presenteth *Wm. Morden* to the church, who is admitted, instituted, and inducted. On 10 *March*, 4 *Car.* *Wm. Morden* dieth. On 16 *Mar.* 4 *Car.* *Wm. Randall* dieth. On 24 *Mar.* 4 *Car.* *Thomas Alden* is admitted, instituted, and inducted.

And I, being of counsel with the plaintiff, conceive that the judgement ought to be given for the plaintiff. For I conceive that the appropriation made by the patent of 2 *Apr.* 1 *E.* 6. unto the twelve governors, was ill in its creation; 1st, in respect that they are a lay corporation, that is to say, a corporation of laymen: 2dly, in regard that there was not an endowment of a vicar according unto the statute in that case.

As concerning the first point, which is, whether the appropriation made unto the lay corporation be good or not, I hold it is not good. 1st, In regard that after the appropriation made, there is a cure of souls remaining; and the body unto whom the appropriation is made is in law the perpetual incumbent of the same, and the parson of that church. And this lay corporation being of that quality that it cannot have cure of souls, nor be parson of the church, the appropriation made cannot be good. And that after the appropriation it remaineth parson, appears by divers books.

19 *E.* 3. *quare impedit* 19. Upon a *quare impedit* brought by the abbot of *M.* against the dean and chapter of *E.* and against *J. G.* and *T. W.* *J. G.* and *T. W.* pleaded, that they held the church of *D.* annexed unto their prebend, as parson imparsonnee; and so it was full by 20 years; judgement of the writ. And it appeareth by this book, that the appropriation was made unto the prebend by *William* the Conqueror; and there it is shewn, that the king at that time might make an appropriation; but *Herle* saith, that the law was taken otherwise now.

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45 E. 3. *Darren presentement* 8. Upon an assise of *darren presentement* brought by *John Newers* against the prior of *F.* he pleaded, that he held the church in proper use, and it was full of himself days and years before the writ purchased: and the appropriation appeareth to be made by licence of the king, patron, and ordinary.

33 E. 3. *Ayd de roy* 103. A writ of right being brought of the advowson of *H. juxta Staff.* against the dean of *Stafford*, he pleaded, that he held it as a chapel annexed unto the deanry in *propriis usus*, and that the king granted unto him the deanry; and so prayed aid of the king. And there it appeareth, that of that chapel he was in nature of a parson.

22 E. 3. 2. & 12. Upon a *quare impedit* brought by *James D'Audeley* against the abbot of *S.* of a church, the abbot pleaded, that that which is called a church was a chapel annexed to the church of *C.* which he held in proper use; and sheweth how it was appropriated; and he was driven to answer, &c.

38 H. 6. 19. & 20. An abbot, that hath a church appropriated unto him, is a parson that may have a spoliation, *juris utrum*, or other writ, as a parson; for he is both abbot and incumbent. *F. N. B.* 37.

F. N. B. 38. & 26 H. 6. *Briefe al evesque* 6. Where the defendant doth claim the advowson, as parson imparsonnee, howbeit that the title be found for the defendant, he shall not have a writ to the bishop. And the *quare impedit* was brought against the master of *St. Lawrence Poultney*.

F. N. B. 49 E. If an abbot or prior be parson imparsonnee of any church, and alien the land of his rectory, his successors shall have a *juris utrum* to recover this land, and not other writ; for that he shall have it as parson. And by 7 *Eliz. Dy.* 248. if part of the rectory be demanded against him, it shall be demanded against him as parson.

11 H. 4. 68. by *Thirning*, an abbot, that hath a parsonage appropriated unto his house, shall be named parson, and shall have aid, and a *juris utrum* as parson. And by *F. N. B.* 50. *F.* he ought to be named parson in the writ. 21 H. 7. 5. *Comm.* 500. *Grendon's case*.

12 H. 4. 20. Where the prior of *Burton* made title by prescription in a plaint upon an assise to a rent, the writ was abated, because he claimed it in right of his parsonage, and did not name himself parson.

19 H. 3.

19 H. 3. *Juris utrum* 16. *Provisum est coram domino rege et consilio suo, et episcopis, comitibus, et baronibus suis, quod omnes viri religiosi quicunque sint qui habent ecclesias parochiales in proprios usus, habeant de cetero assisam, ad recognoscendum utrum feodum sit libera elemosina, eodem modo et per verba consueta, secundum quod clerici, rectores ecclesiarum habent illas, et vocentur parsonæ in brevibus sicut et clerici existentes ecclesiarum conventualium. et earum feodorum de quibus hujusmodi assisæ capiuntur.*

21 H. 7. 1. 23. & 4. A parsonage that was appropriated unto the priory of *B.* which was a cell of the abbey of *Caen* in *Normandy*, stood charged with an annuity by prescription; and king *Edward* the 3d seized all the alien priories; and afterwards, by an act of parliament made in the time of *H. 5.* it was enacted, that all the lands seized in manner aforesaid, should remain in possession of the king, his heirs and successors; and afterwards king *Edward* the 4th granted the parsonage unto the dean of *St. Stephen* and his successors; and agreed there, first, that the dean ought to be charged as parson. And a difference was there taken, where there was spiritual administration: for, if spiritual administration, then a layman not capable of it; but, if not a spiritual administration, then a layman capable. And yet it was there said, that the king had several benefices in *Wales* continually in his hands, and that several lords had parsonages in their proper use: but *Frowike* saith, that they had them by the assent and agreement of the supreme head.

27 H. 8. 5. A parsonage, that stood charged with an annuity, was appropriated unto the master of the college of *Wyke* after time of mind; and upon a writ of annuity brought, it was holden, that it ought to be brought against him as parson, and he ought to be named parson; and the seisin being alleged after the appropriation, the appropriation need not to be shewn in the count.

6 H. 8. *Croke* 169. (o) by *Boteler*, in case of consolidation and appropriation, the parsonage remaineth, and hath its essence: for, if the church of *Dale* hath an annuity, which is detained, and after the church is consolidated to the church of *B.* he ought to bring his writ of annuity by the name of parson of *Dale* *ratione ecclesiæ sue de Dale* annexed to *B.*

And so it appearing by these books, that after the appropriation made, the parsonage remaineth, the incumbency and cure of souls continueth; when the corporation is of that nature, that it may not

(o) The book here referred to under the name of *Croke*, is *Kilbury's Reports*, which were edited by *John Croke*, serjeant at law.

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I know not whence this definition is taken, nor am I sure that I read the manuscript correctly.

be parson, nor be incumbent, nor have cure of souls, the appropriation unto such a corporation may not be good.

2dly. The rectory, which in its nature consisteth of glebe and tithes, is called *beneficium ecclesiasticum*, which is defined *definita et spiritali muneri conjuncta jurium ecclesiasticorum portio, certis ædibus sacris in hoc assignata, ut perpetuò per clericos ad vitam utenda clerico legitimè assignetur*; whereof a layman is not capable.

Reg. 33. F. N. B. 49. N. the writ of *juris utrum*, which is, "*parati sacramento recognoscere utrum sit libera elemosina pertines ad ecclesiam, an laicum feudum*," sheweth, that the glebe and tithes belong unto churchmen and ecclesiastical persons, and not unto laymen.

Seld. Hist. 112. The council of *Lateran* holden in the year 1028 hath this canon: "*Decimas quas in usum pietatis concessas esse canonica autoritas demonstrat, a laicis possideri apostolicâ autoritate prohibemus. Si se enim ab episcopis, vel regibus, vel quibuscumque personis eas acceperint, nisi ecclesiæ reddiderint, sciant se sacrilegii crimen incurrere*." And this canon is iterated in the general council of *Lateran* holden in the year 1139.

Id. 113, 114. And however it is clear that anciently the use of infeodations or conveyances of the perpetual right of tithes into lay hands was frequent; and are stiled in the canon laws *decimæ laicis in feudum concessæ*, and *feudales*, and *infeudatæ*, and were mere lay possessions and determinable before the secular judge; yet, since the year 1180 and the council of *Lateran*, which is, "*Prohibemus ne laici decimas cum animarum suarum periculo detinentes in alios laicos possint aliquo modo transferre; si quis vero receperit, et ecclesiæ non reddiderit, christianâ sepulturâ privetur*;" the infeodation of tithes hath ceased, and the canon hath been received for a binding law.

Id. 107—8. An epistle of *Peter*, abbot of *Clugny*, to *St. Bernard*, abbot of the *Cistercian* order at *Clairvaux*, about the monks of *Clugny* their possessing of a large number of parochial tithes. The *Cisterrians* had divers complaints made against them, and one was upon this very point in these words: "*Ecclesiarum parochialium primitiarum et decimarum possessiones quæ ratio vobis contulit? cum hæc omnia non ad monachos, sed ad clericos, canonicâ sanctione pertineant: illis quippe quorum officii est baptizare, et prædicare, et reliqua, quæ ad animarum pertinent salutem, gerere, hæc concessa sunt, ut non sit necesse eis implicari secularibus negotiis; sed, quia in ecclesiâ laborant, in ecclesiâ vivant*." And the abbot gave his reason for their enjoying of tithes thus: "*Quia monachi ex maximâ parte fidelium salutis invigilant, licet sacramenta minimè ministrant, æstimamus ipsorum*"

“*forum primitias, decimas, et oblationes, et quæque beneficia eos dignè posse suscipere, quoniam et reliqua populo Christiano a presbyteris faciunt exhiberi.*” And another of greater note than this abbot, viz. *Peter Damien*, pretends special charity towards the poor for sufficient reason why monasteries and hermitages had tithes given to them: “*Ut copiosiora*” saith he, “*alimenta proficiant, dantur in monasteriis et eremis decimæ quorumcunque proventuum, non modo pecorum, sed et ornium pariter et ovorum.*”

Id. 128. *Alexander* the third directed the bishop of *Amiens* to decree, that a gift of tithe by an abbot into lay hands was void, *quoniam sanctuarium de jure hæreditario possideri non debet.*

Id. 123. Tithes are called *Res dominicæ*, and *Dominica substantia*, and *Dei census*; and by the ancients are stiled *Patrimonia pauperum*, *Tributa egentium animarum*, *Stipendia pauperum*, *hospitum*, *peregrinorum*; and the clergy were not to use them *quasi suis*, but *quasi commendatis*, as the words are of the council of *Nantes*. And Pope *Alexander* the third, in an epistle to the bishop of *Rheims*, saith, *Non ab hominibus, sed ab ipso Deo sunt institutæ*; and in another to the bishop of *Amiens*, he calleth them *Sanctuarium*. Infra.

Lindwood in his title *De locato et conducto*, cap. *Licet*, &c. ver. *Portiones*, saith, “*Ante illud concilium*” (which was the council of *Lateran* holden under *Alexander* the 3d.) “*bene potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ vel monasterio dare; non tamen post tempus dicti consilii.*” And with this agree 10 *H.* 7. 18. 7 *E.* 6. *Dy.* 84. 2 *Rep.* 44.

The preamble of the statute of 32 *H.* 8. c. 7. doth recite, that divers of the king’s subjects being lay persons, having parsonages, vicarages, and tithes, cannot by the order and course of the ecclesiastical laws of this realm sue in any ecclesiastical court for the wrongful with-holding and detaining of the said tithes or other duties; nor cannot by the order of the common laws of this realm have any due remedy against any person or persons, their heirs or assigns, that wrongfully with-hold or detain the same. And by this statute there is a remedy provided for laymen.

2 *Rep.* 44. in the bishop of *Winchester*’s case it is resolved, that none by the common law hath capacity to take tithes but only spiritual persons, or *persona mixta*: and regularly, no mere layman was at common law capable of them, but in special cases; for no layman, but in special cases, may sue for them at the common law in court christian, or for subtraction of them. But, it was there resolved, that he was capable of a discharge of tithes at the common law in his

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his own lands, as well as a spiritual man ; for the parson, patron, and ordinary might at the common law discharge a parishioner of tithes in his land ; or he may be discharged by composition ; but may not prescribe in *non decimando*, as a spiritual person may do.

2 E. 4. 15. A temporal man may not have an action in court christian for tithes : and one that taketh a lease of tithes may have his remedy at the common law for his tithes taken away, and the court shall not be ousted of jurisdiction ; for the lessee hath them as a lay chattel and in his own right.

25 H. 8. Br. *Jurisdiction* 95. If the lord of a manor claimeth the tithes of such lands in *D.* to find a chaplain in *D.* and the parishioners claim them also for the same purpose ; *dicitur pro lege*, the lay court shall have jurisdiction between them, and not the spiritual court. 2 Rep. 46. *Pigot and Heron's case*, a layman owner of tithes in this manner.

7 E. 6. Dy. 83, 84, 85. It appeareth, that since the statute of 32 H. 8. c. 7. a layman may have tithes, and may bring an assise or other real action for them, as he may do of any other temporal inheritance.

Lindwood in his title *De locato et conducto*, and chapter on the constitution of John Peckham, archbishop of Canterbury, *Ecclesiæ ne conferantur, &c.* and ver. *Nisi personis ecclesiasticis*, saith, "*Quoddam persona ecclesiastica dicitur, non solum persona ordinata ad quæcunque alia ministerio ecclesiastico deputata. Unde Conversi, Pœnitentes, Templarii, et Hospitalarii, ministerio ecclesiastico deputati, dicuntur Personæ Ecclesiasticæ. Item quæcunque personæ regulares dicuntur Personæ Ecclesiasticæ. Cum itaque hujusmodi personarum ecclesiasticarum plures sint in statu laicali, et non clericali, quales sunt Templarii et Hospitalarii, et multi qui dicuntur Conversi, apparet, quod talibus laicis ecclesiæ possunt tradi ad firmam. Et ubi simpliciter statuitur, ne laicus ecclesiæ teneat ad firmam, non distinguendo, utrum sit laicus professione et habitu, necne. Sed illud puto intelligendum de his, qui sunt merè laici tam habitu quam professione. Nam Conversi, et alii prædicti divino officio mancipati, licet non sint ordinati, tamen ratione professionis et habitus differunt ab aliis laicis. — Et regulariter, verum est, quod laici non possunt, nec debent tenere ecclesiæ ad firmam. — Clerico seculari deficiente, ob magnam necessitatem poterit episcopus dispensare, ut ecclesiæ committatur laico per viam firmæ ad tempus.*"

Lindwood in the same title, cap. "*Licet bonæ,*" &c. ver. "*In suis usus,*" "*Decimæ, et alia in ecclesiis obvenientia non sunt laicis concedenda,*"

concedenda, viz. ut oblationes vel decimas habeant per viam tituli, et jure suo. Secus tamen est, si in laicum transferatur mera facultas facti, scil. perceptionis fructuum per viam firmæ. Nam merum facti exercitium sine titulo bene cadit in laicum: potest enim laicus esse procurator in causis spiritualibus. And in the same chapter, *Asserunt non ligari,* *Beneficium tenetur ut proprietas, non autem ut beneficium, quando non obtinetur per institutionem canonicam, nec consideratur vacatio per mortem prælati; sed commoditas fructuum percipiendorum aliquibus conceditur per superiorem alio, utputa, vicario curam animarum inibi gesturo. Et beneficia tenent non ut beneficia, sed ut proprietatem, quorum cura exercetur per vicarium perpetuum constitutum in eisdem.* And in the same chapter, *Portiones,* *Hæ portiones potuerunt pervenisse ad locum religiosum de concessione etiam laici, cum solius Diæcesani consensu de decimis vel proventibus quas laicus talis ab ecclesiâ aliâ habuit in feudum ab antiquo. Et hoc verum, si tales portiones decimarum eis donatæ fuerunt ante Concilium Lateranense, quod celebratum fuerit anno Domini 1180. tempore Alexandri tertii. Nam ante illud Concilium bene potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ vel monasterio dare; non tamen post tempus dicti Concilii.*

In the same chapter, *Appropriationum,* *Appropriatio locum habet in omni casu quo ecclesia tenetur ut proprietas, sive agatur de ipsius totalitate, sive de ejus parte. Et appropriatio in largo modo sumpta sonat in casum illum quo beneficium detur in usus proprios. Sed hic adverte, quod quandoque jura loquuntur de casu vel jure donationis ecclesiæ factæ loco religioso, vel alteri; quandoque de casu vel jure unionis sive annexionis factæ tali loco. Et in appropriationum literis solet superior uti his terminis, "Unimus, annectimus et incorporamus, et eam in proprios usus perpetuò obtinendam concedimus:" quæ omnia et singula quandam diversitatem important, aliàs esset nugatio et inculcatio terminorum, quod reprobatur in jure. Et multiplex est unio. Fit enim unio ecclesiarum, quando una subjicitur alteri: et per talem unionem non præjudicatur diæcesano cui suberat, nisi fiat de ejus consensu; etiamsi confirmetur per Papam, nisi id in confirmatione exprimatur. Fit etiam unio ecclesiarum sic quod unus sit prælatus ambarum; et tunc utraque remanet in statu suo ut prius, exceptâ solâ prælaturâ. Fit etiam unio duarum ecclesiarum ad invicem, et tunc consuetudines et privilegia, quæ in alterâ earum habentur meliora et humaniora, tenenda sunt. Fit quoque unio ecclesiarum, cum conventualis in cathedralem eligitur, et idem est prælatus utriusque. Et hanc facit solus Papa.—Ecclesiæ parochialis ad reli-*

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“ *giusum locum propriè non fit unio, sed potius donatio. Nam unio pro-*
 “ *priè locum habet in rebus quæ sunt ejusdem naturæ, utputa, in duobus*
 “ *prioratibus, vel in duabus administrationibus vel obedientiis, in qui-*
 “ *bus religiosi subjectionem habent. Sed verum est, quòd ecclesia paro-*
 “ *chialis sæcularis, et cui solet deserviri per clericos sæculares, non est*
 “ *ejusdem naturæ cujus est ecclesia regularis; unde inter res propriè*
 “ *non cadit unio, licèt fructus talis ecclesiæ possint incorporari aliis fruc-*
 “ *tibus ecclesiæ regularis, sic ut religiosi ipsos fructus percipiant in usus*
 “ *proprius, reservatâ congruâ sustentatione pro ministris in tali ecclesiâ*
 “ *deservituris.*”

Lindw. tit. De Judiciis, cap. “ Item omnes,” ver. “ Personas
 “ *ecclesiasticas,” “ Personæ ecclesiasticæ sunt Clerici, in quocunque or-*
 “ *dine constituti: præter quos etiam comprehenduntur sub his personis*
 “ *ecclesiasticis Templarii, Hospitalarii, Converfi, et quilibet Religiosi.*”

And so it appeareth by all these books of the canon law, that, until the council of *Lateran*, laymen were capable of tithes in point of pernaney; and infeodations might be made unto them, and, by consequence, appropriations: but, after the council of *Lateran*, those that were mere laymen were not capable of tithes in point of pernaney, although Monks, Templars, Hospitallers, and such other ecclesiastical persons were, as not being accounted *Laici* within the prohibition of that council. And this council being received in *England*, as it appeareth by *Lindwood*, 2 *Rep.* 44. 32 *H. 8. c. 7.* 2 *E. 4. 15.* and *Br. Jurisdiction* 95. it was part of the law of *England*.

Dav. 70 b. Those canons which were received, accepted and used in any christian realm or commonwealth, by such acceptation and usage have obtained the force of laws in such particular realm or state, and are become part of the ecclesiastical laws of that nation. And therefore those that were embraced, allowed, and used in *England*, were made by such allowance and usage part of the ecclesiastical laws of *England*; and the interpretation, dispensation, and execution of those canons, so become part of the laws of *England*, belong only to the king of *England*, and his magistrates, within his dominions.

7 *H. 8. Croke* 181. 182. 184. It appeareth that the decrees and canons made by the pope, which were not received here in *England*, do not anyways bind: but it is admitted, that if they were received here in *England*, they would bind, as part of the law of *England*.

26 *E. 3. 55.* 29 *E. 3. 44.* The constitution of pluralities is received as part of the law of *England*, and thereupon by the accept-

ance of a second benefice the first is void. 24 E. 3. 30. 4 Rep. 75. 79.

29 E. 3. 44. The sheriff upon a writ of accompt returneth, *Clericus est beneficiatus, non habens laicum feodum*, and no *capias* might be granted against him, because it appeared that he had a benefice.

Bracton, c. 2. "*Leges Anglicanæ et consuetudines approbatæ consensu utentium, et sacramento regum confirmatæ mutari non poterunt, nec destrui sine communi consensu et consilio eorum omnium quorum consilio et consensu fuerunt promulgatæ: in melius tamen converti possunt, etiam sine eorum consensu, quia non destruitur quod in melius commutatur.*"

11 H. 4. 76. If the king doth grant unto a man, that he shall hold his land after such time as he is entered into religion and professed, such grant is void: for such a grant is against the common law of the land, and the heir upon the profession and entry into religion is to enter and inherit by the common law.

4 Rep. 35. *Bozoun's case*. Where the queen may not by the common law make the grant, there, a *non obstante* of the common law will not, against the reason of the common law, make the grant good: and therefore, if the king will grant a protection in a *quare impedit*, or assise, with a *non obstante* of any law to the contrary, this grant is void; for, by the common law, protection doth not lie in either of those cases for the loss that may happen to the plaintiff by such delay; and therefore the *non obstante* may not help.

Comm. 398, 399. *the Earl of Leicester's case*, and 29 E. 3. 25. do agree, that if one be attainted by parliament, the king of his own head may not reverse this award made there.

1 Mar. Dy. 94. The king may not annex or unite a manor to the duchy of *Cornwall* by his letters patent without authority of parliament, and make this parcel of his duchy, and to go after the form and course of the duchy. 8 Rep. 16. 17. *The Prince's case*.

7 Rep. 7. *Calvin's case*, 36 H. 6. The king by his letters patent may not make any inheritable, who is not inheritable by the common law of the land: and, therefore, he may not grant, that an *antennatus*, or other alien, shall take by descent from his father, being an alien.

5 Rep. 55. *Knight's case*. The king may not alter the law or custom of *England* by patent. 37 H. 8. *Br. Patents* 100.

49 E. 3. 4. The king may not make land devisable by his charter.

Pasch. 6 *Ja.* in the chancery, in the case of *Aulnage*, the case of *one Peckworth and Dawson* was cited to be adjudged, that a grant made

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9 Rep. 123. *Anthony Lowe's case*. The king by his charter may not alter the law; *nam id rex potest, quod de jure potest*.

And it being so, that canons received here in *England* by the common assent of the king and his people, and not being contrary to the law of God, prerogative of the king, or statutes of the realm, are become the laws of this realm; and it not being in the power of the king to alter and change the laws of this realm; this charter of appropriation, which maketh laymen capable of tithes, contrary to the law received, and maketh them parsons imparsoned of a spiritual benefice, cannot be good.

And whereas it may be objected, that it was only the council of *Lateran* that made laymen incapable of tithes and of an appropriation granted unto them; and so, upon the matter, it was only *malum prohibitum*, with which the king may dispense, as it appeareth by 2 Rep. 3. 12. 1 H. 7. 3. 11 H. 7. 12. 37 H. 6. 4. and many other authorities; I answer, that the appropriating of the rectory, which is *libera elemosina ecclesiæ*, unto a lay corporation, the giving of laymen power to hold tithes *in propriis usus*, when they are *redditus ecclesiæ*, the making of laymen incumbents of a spiritual benefice, is *malum in se*, as it appeareth by Comm. 497. *Grendon's case*, where it said by *Dyer*, that an appropriation made unto nuns was *grande nefus*, for they could not administer the sacraments, nor say divine service to the parishioners; and this, which was under pretence of hospitality, was the ruin of hospitality. And it being *malum in se*, the king by his letters patent may not dispense with it by any *non obstante* that he can make.

19 H. 6. 63. The king granteth unto one, that he shall not afterwards be punished in felony or trespass; such grant is void; for it is against common right and justice, and may not stand with the law.

11 H. 7. 12. The king may not dispense with one to kill another, inasmuch as it is *malum in se*, and prohibited by the law of nature. So, to make a nuisance in the highway.

Dav. 75. The king may not grant, that if a man do a trespass unto me, I shall not have an action against him.

And whereas it may be objected, that there are many precedents of appropriations unto lay corporations, colleges, hospitals, &c. and a great inconvenience may ensue, if such appropriations shall be adjudged to be void; I answer, 1st. *summa ratio, quæ pro religione facit*;

fuit; and the multitude of precedents, as it appeareth by *Magdalen College case*, 11 Rep. 73. are not to bear any way; for as it is said there of the possessions of the college, so it may of this rectory; that this rectory which was given for the maintenance of religion, and feeding of the souls of the parishioners, should be converted to a private use; *sicque* (as the statute of *Carlisle*, 31 E. 1. speaks) *quod olim in usus pios ad divini cultus augmentum et cætera opera pietatis charitativæ fuit erogatum, nunc in sensum reprobum est conversum*. And 4 Rep. 33. *Milton's case*, and 94. *Slades' case*, will tell you further of the fruit of precedents.

2dly. All such appropriations as are composed of ecclesiastical persons, although no part of the priesthood, are out of the council of *Lateran*, and so no ways prohibited by the law, and therefore such appropriations are good enough.

11 Rep. 76. *Magdalen College case*. The college is said to be temporal, where it is for the advancement of liberal arts and sciences, or to educate young men in good literature; ecclesiastical, where it consisteth of mere ecclesiastical persons: and mixt, where it doth not only consist of ecclesiastical persons, but also of others. And 8 & 9 Eliz. Dy. 255. it is adjudged, that *Trinity college* in *Cambridge* shall be said to be a spiritual corporation within the statute of 1 & 2 P. & M. c. 8. for the statute being made for the maintenance of religion, advancement of learning, and exhibition of poor scholars, it shall be favourably expounded.

3dly. I answer, *distinguenda sunt tempora*: for before the decree of the council of *Lateran*, which was made 25 H. 2. and prohibited the giving of tithes unto laymen, appropriations might be made unto lay corporations: and the precedents of appropriations unto lay corporations may be of appropriations made before that time; and those are not to be resembled unto our case, where the appropriation was made 1 E. 6.

Comm. 496. 497. It is resolved, that none is capable of an appropriation but a body corporate or politick spiritual, that hath succession: for the effect of an appropriation, at the first institution of it, was, to make any body incumbent perpetual, and as incumbent perpetual to have the rectory; and the houses, and glebe, and tithes, as parcel of it: and in this that he is made parson, he hath cure of souls of the parishioners, in which case he ought to be a person spiritual. And as a person ought to present unto a church a person spiritual, and not a person temporal: so, and by the same reason, an appropriation ought to be unto a person spiritual, and not temporal; for the one hath cure of souls as well as the other; and they do

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5 Rep. 10. *Caudry's case*, 7 E. 3. *Quare impedit* 19. No man can make any appropriation of any church having cure of souls, being a thing ecclesiastical, and to be made to some person ecclesiastical, but he that hath ecclesiastical jurisdiction.

11 Rep. 70. 72. *Magdalen College case*. The king who is *persona mixta*, *medicus regni*, *pater patriæ*, et *sponsus regni*, who by the ring is espoused unto the realm at his coronation, shall not be enabled to make an appropriation unto a lay corporation, which would be a means of dilapidations, decay of spiritual living and of hospitality, and, by consequence, a decay of religion and justice; and therefore it is true, *quod summa ratio est, quæ pro religione facit*: and as the statute of *Westm. 2. cap. ult.* saith, *Summa charitas est facere justitiam singulis, et omni tempore quando necesse fuerit*. And the king being the fountain of justice and common right, and God's lieutenant, may not do wrong unto the church in taking that from the church which was dedicated to the same. *Et solum rex hoc non potest facere, quod non potest injustè agere*.

Inst. 341. Braet. Lib. 4. c. 226. Causæ ecclesiæ publicis causis equiparantur: et ecclesia fungitur vice minoris; meliorem potest facere conditionem suam, deteriorem nequaquam.

And it is to be observed, that if an appropriation may be made unto a lay corporation, the jurisdiction of the ordinary who hath power of visitation and of certifying profession, is taken away; the which is against reason, unless it be with his own consent. 8 Aff. pl. 29. 10 Eliz. Dy. 270. 44 Aff. pl. 7. 9 H. 7. 2.

And the law hath a special care, that he who is married unto the church, be not proved a miscreant, a schismatick, an irreligious person, a person illiterate, a layman, a bastard, or a villein, as it appeareth by 5 Rep. 57. *Specot's case*, 38 E. 3. 2. 5 H. 7. 20. 15 H. 7. 8. 14 H. 7. 25. 12 & 13 Eliz. Dy. 293. 11 H. 7. 12. 11 H. 4. 8. and many other books; by which it appeareth, that he may be refused by the ordinary; or, if not refused, he may be deprived for these causes after such time as he hath gotten into the church.

And by the same reason that the law is careful who shall be incumbent, where he is to be only incumbent for his life; it will also be careful where a corporation is to be an incumbent perpetual.

And whereas it may be objected, that this appropriation in the case at the bar, was for good and spiritual uses; it appearing by the king's charter that it was *ad divini cultûs augmentationem, ad bonorum, catallorum et hæreditamentorum ecclesiæ parochialis de Creditorum*

meliozem sustentationem, et ad puerorum eruditionem; and that hospitality, which was the first cause of the institution of impropriations, may as well be maintained here, as in the case of other appropriations, and that there may be a vicar to serve the cure, and to administer the sacrament as well as in other appropriations; I answer, that the good uses and good end may not make an appropriation good, where the hand, that is to take it, cannot take it, and the body, unto whom it is made, is by the law disabled to receive it: for, if an appropriation be made unto a monk, that is a dead person in law, or to a layman; for all those uses, it cannot be good, by reason of the disability which the law putteth upon a monk or layman to receive it.

11 R. 2. pat. 2. No. 38. Rot. patentum. The writ directed unto the sheriffs of London reciteth, "*Cum ecclesiæ Sancti Dunstani West parochialis in suburbio London, et ipsius ecclesiæ fructus et proventus per dominum Henricum quondam regem Angliæ ad tunc patronum inter cetera piæ assignati fuissent ad sustentationem illorum qui a Judaicâ pravitate ad fidem Catholicam in regno Angliæ tunc conversi fuerunt, et aliorum qui se converterent; quibus quidem conversis et convertendis idem progenitor infra parochiam ecclesiæ prædictæ certum locum cum ad inhabitandum ordinavit, et capellam in honorem beatæ Mariæ Virginis construi fecit: necnon pro sustentatione capellanorum et clericorum in dictâ capellâ deserviturorum, voluit certum custodem per ipsum et hæredes suos dictis conversis assignari; ad ea quæ eis et capellanis et clericis prædictis pro sustentatione suâ assignata fuerunt, et assignarentur, sibi liberanda: ac venerabilis pater R. quondam episcopus London, civitatem et dioccesim London visitando, invenit quod cura dictæ ecclesiæ parochialis penes custodem dictorum conversorum aut alium juxta canonicas sanctiones, prout debuit, non remansit; et volens statui ecclesiæ illius et saluti animarum juxta officii sui debitum providere, et devotionem sinceram dicti progenitoris nostri et domini Edwardi quondam regis Angliæ progenitoris nostri, de assensu ipsius Edwardi, ordinasset*, quod extunc dictus dominus Edwardus et hæredes sui idoneam personam ad dictam ecclesiâ eidem episcopo et successoribus suis præsentarent canonicè rectorem instituendû in eadem, qui omnes fructus et obventiones dictæ ecclesiæ integrè perciperet, et omnia onera ordinaria et extraordinaria dictum ecclesiam qualiter-*

* This ordinance, which was made by Richard Newport bishop of London in 1317, is to be met with in the *Bundake* Register, p. 37. in the Registry of the Diocese of London.

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“*cunque contingentia subiret, et præter hoc conversis prædictis dum vixerint in subventionem sustentationis eorum seu capellanorum et clericorum in prædictâ capellâ beatæ Mariæ deserviturorum quatuor libras ad dictum custodem, qui pro tempore fuerit, aut ejus locum tenentem ministrand’ singulis annis solveret.*” And this which was for the payment of the arrearages of 4 l. by the year by *John Brampton* parson of the said church, unto *John de Burton* warden of the said house. And observe out of this case, that there was a presentation made by the king unto the church, and a disappropriation made, which could not have been, if the appropriation had been good. For, as it appeareth by *F. N. B. 35. F. Comm. 500. Grendon’s case, 38 H. 6. 19. & 20. 39 H. 6. 20.* a presentation made by an estranger unto an advowson which is appropriate unto an abbey, be the presentation made in time of vacation, or in the time of the abbot, will be void, howbeit that he be instituted and inducted, insomuch that the church may not be void, but is always full, and a presentation, when the church is full, is void; but, if the abbot himself had presented his clerk unto the bishop, this presentation had disappropriated the advowson for ever, and had made it presentable afterwards, according unto *F. N. B. 35. F. Comm. 501. 22 H. 6. 28. and 11 H. 6. 19.*

The reasons then why this appropriation unto a lay corporation will not be good, are,

1st. In regard that he unto whom the appropriation is to be made, is to be a perpetual incumbent of the church appropriated, and parson imparsoned of that church; and therefore, the corporation unto whom the appropriation is made, must be of such quality as is proper to be incumbent of a church, of which nature ecclesiastical corporations are, and not a lay corporation.

19 H. 3. Juris utrum 16. 19 E. 3. Quare impedit 19. 22 E. 3. 2. & 12. 33 E. 3. Ayde roy 103. 45 E. 3. Darren presentement 8. 11 H. 4. 68. 12 H. 4. 21. F. N. B. 38 L. 26 H. 6. Brief al Evefque 6. 38 H. 6. 19. & 20. 21 H. 7. 1, 2, 3, & 4. 6 H. 8. Croke 169. 27 H. 8. 5. By all these books it appeareth, that the corporation unto whom the appropriation is made must name himself parson in an action brought, and he must likewise be named parson.

5 Rep. 57. Specol’s case, 58. 38 E. 3. 2. 5 H. 7. 20. 15 H. 7. 7. & 8. 14 H. 7. 25. 12 & 13 Eliz. Dy. 293. 11 H. 7. 12. and 11 H. 4. 8. describe the qualities of an incumbent.

2dly. In regard that the thing, whereof the appropriation is made, is a rectory, that consisteth of glebe and tithes *ac beneficium ecclesiasticum,*

ecclesiasticum, it is *libera elemosina ecclesiæ, non laicum feudum; sanctuarium Domini*, that is, consecrated unto the church; and therefore it may not be conferred or appropriated but unto those that are church-men or ecclesiastical persons. *F. N. B.* 49 *N. Register* 33. *Seld.* 128. 123. *Lindw.* 115. 116. 11 *Rep.* 75. *Magdalen College case.* 29 *E.* 3. 44. 1 *Inst.* 341.

3dly. In regard that this corporation, unto which the appropriation is made, is a corporation consisting of mere lay persons, and no manner of ecclesiastical persons amongst them, and so in law is a lay corporation, and not either a mixt corporation (where *magis dignum* may *trahere ad se minus dignum*), nor an ecclesiastical corporation; and such lay corporation by the canons of the church made long since by *Alexander* the third in 25 *H.* 2. and received here in *England*, and so made part of the law of *England*, are disabled to take tithes to their proper use, and, by consequence, to have an appropriation made unto them. And they being disabled by the law, the king by his letters patent may not enable them; for this were to change the settled law of the kingdom of *England*, the which the king by his charter may not do.

Seld. 112. 114. 177. 128. *Lindw.* 113. 117. 32 *H.* 8. c. 7. 2 *E.* 4. 15. 2 *Rep.* 44. *Bishop of Winchester's case.* 25 *H.* 8. *Br. Jurisdiction* 95. It appeareth from these books, that laymen are incapable of tithes by the ecclesiastical laws received here in *England*.

Dav. 70. 25 *H.* 8. c. 21. 7 *H.* 8. *Croke* 181. 182. 184. 26 *E.* 3. 55. 24 *E.* 3. 30. 29 *E.* 3. 44. 4 *Rep.* 75. 79. It appeareth from these, that if the canons of the church be received here in *England*, they are become part of the law of *England*.

Braet. c. 2. 11 *H.* 4. 76. 4 *Rep.* 35. *Bozoun's case.* 1 *Mar. Dy.* 94. 7 *Rep.* 16. 17. 5 *Rep.* 55. *Knight's case.* 9 *Rep.* 123. *Anthony Love's case.* 49 *E.* 3. 4. 19 *H.* 6. 73. It appeareth by these, that the king by charter cannot alter the law of the kingdom.

11 *H.* 4. 76. *Comm.* 399. *Leicester and Heydon's case.* 29 *E.* 3. 29. 7 *Rep.* 7. *Calvin's case.* It appeareth that the king cannot enable one by his charter to take, who standeth disabled by the law.

19 *H.* 6. 63. 11 *H.* 7. 12. *Dav.* 75. shew, that the king may not by his charter dispense with *malum in se*.

4thly. In regard that there are divers resolutions in the very case in question. *Comm.* 497. *Grendon's case.* 11 *R.* 2. *pat.* 2. *No.* 38. 5 *Rep.* 10. *Carwry's case.* 7 *E.* 3. *Quare impedit* 19. 11 *Rep.* 70. *Magdalen College case.*

5thly. The objections that have been made of the other side are not of any validity, and may easily receive an answer.

As to the second point, which is, whether the appropriation be destroyed for want of an endowment of a vicar, it will rest upon many points. The first of which will be, whether it be of necessity that a vicar be endowed, otherwise the appropriation to be void. The second will be, whether here be a sufficient endowment of a vicar, and an endowment in due time, whereby to continue the appropriation, admitting that an endowment were necessary.

Lindw. “*De locato et conducto,*” cap. “*Licet bonæ,*” ver. “*Afferunt non ligari.*” “*Non video quòd per concessionem vel appropriationem ecclesiæ factam loco religioso sub aliquo modorum, de quibus præfertur, designat ipsa ecclesia esse beneficium ecclesiasticum; immo semper remanet in statu suo, solum quoad divini ibi celebranda, sacramenta et sacramentalia ministranda, et numerum ministrorum, qui diminui non debet: licet fructus talis beneficii qui remanent ultra necessaria ad sustentationem hujusmodi ministrorum et onera eis incumbentia, in certis cessibus possent in usus proprios converti ipsorum Religiosorum.—Et sic monasterium hujusmodi potest bona ecclesiæ taliter donatæ vertere in usus proprios, reservatâ tamen congruâ sustentatione secundum morem antiquum ecclesiæ, ut, videlicet, nullus minister in ecclesiâ ab antiquo positus et visitatus diminuatur, sed numerus ministrorum in statu antiquo conservetur: et si aliquid ultra eorum congruam sustentationem superfit, illud cedat in proprios usus ipsorum Religiosorum.*”

Lindw. “*De officio vicarii,*” cap. “*Quoniam,*” ver. “*Assignetur,*” upon the rubrick, which is, “*Vicario nisi valde tenues sint ecclesiæ conditiones non minor quam quinque marcarum assignetur quotannis redditus. Animadvertat autem proprius episcopus, uter principaliter an vicarius onera ecclesiæ subeat;*” saith, “*Assignetur tempore ordinationis ipsius vicariæ, vel saltem antequam vicarius in ipsâ ecclesiâ instituat. Et si præsentatus sit dignus, episcopus ante assignationem debet eum admittere; et potest, elapso tempore congruo per eum patronum ecclesiæ præfigendo, portionem sufficientem assignare, si patronus ipsam assignare distulerit vel neglexerit.*”

And in the same chapter, ver. “*Sunt contenti,*” “*Episcopus nullum admittat in vicarium ad præsentationem Religiosorum, nisi tantum sibi assignetur de proventibus ecclesiæ, unde jura episcopalia possit persolvere, et congruam sustentationem habere.*” And yet it is there concluded, “*quòd præsentantes prius possunt præsentare, et postea portionem assignare, vel e contra: sic Diœcesanus primò potest admittere, et postea assignare portionem, vel e contra.*”

Selu

Seld. 370, 371. "The most common intent, allowed by canonical confirmation, was, that the corporation whereto the appropriation was made, should put clerks or vicars into the churches so conveyed to them, who were to answer to them for all temporal profits, as tithes, and other revenues: and to the ordinary for spiritual function." And *Selden* voucheth a confirmation made by the archbishop of *York* unto the priory of *Durham*, 17 *Will.* 1. "*Ut omnes ecclesias suas in manu suâ teneant, et quietè eas possideant, et vicarios suos in eis liberè ponant, qui mihi et successoribus meis de curâ tantum intendant animarum, ipsis vero de cæteris omnibus cleemosinis et beneficiis.* So, under *Henry* the second, pope *Lucius* the third writes to all the monks in the province of *Canterbury*, and bids them, that in all churches, *in quibus præsentationem habetis, cum vacuerint, Diæcesanis episcopis clericos idoneos præsentetis, qui illis de spiritualibus, vobis de temporalibus debeant respondere.* And there it is said, that the vicars, incumbents, or presentees had no more of the profits (notwithstanding the institution) than the monasteries would arbitrarily allow them. Nor was there any perpetual certainty of profits or revenues to their presentees, until such time as the monks, by composition with the ordinaries, or by their own ordinance, appointed some yearly salary in tithes, glebe, or rent, severally for the perpetual maintenance of the cure; which salaries became afterwards perpetual vicarages."

*Syntagma Juris**, fo. 282, 283. "*Vicarius perpetuus et clerus quoque est is qui animarum curam habet. Accrevit autem origo curæ ejus generis a tempore quo qui beneficium possidebant habens animarum curam, quod assiduitatem seu residentiam exigit, cæperunt excusare ne assiduitatem in loco beneficii redderent ob majorem dignitatem advenientem, vel quod fructus capitulo alicui vel collegio assignati fuerint, vel aliam ob causam. Et proinde constitui cæpit vicarius, isque perpetuus, cum aliquâ fructuum beneficii portione, qui regeret actu populum in ecclesiâ præpositus ex constitutione ejus qui alios fructus perciperet, approbante et constituente episcopo. Et sic vicaria perpetua beneficium dicitur. Vicaria perpetua unum esse*

* What *Syntagma Juris* this is I know not. I should presume it to be *Struvius's Syntagma Juris Publici*, a book which I have not been able to meet with, and therefore I am not certain that I read the extract correctly. I have examined *Struvius's Syntagma Jurisprudentiæ*, and his *Syntagma Juris Feudalis*, but find not the passage in either of those books.

"videtur

1631.

“ videtur beneficium cum priora, tui annectetur, sive sit prioratus regu-
 “ laris, sive secularis: totidem enim ejus species esse possunt. Proinde
 “ ex eo beneficio æquum est vicarium perpetuum idoneam, et sufficientem
 “ et congruam portionem capere; siquidem episcopus consentire non de-
 “ bet unioni ecclesiarum, priusquam congrua portio earum presbyteris
 “ reservetur, nec præsentatum a prioribus admittere, nisi is habeat unde
 “ commode vivere possit et jura episcopalia solvere. Potest tamen et
 “ episcopus præsentatum admittere primò si velit. et postea præsentato
 “ idoneam et sufficientem et congruam ex fructibus beneficii pensionem
 “ assignare. Congrua portio seu pensio vicarii consideratur aliquando
 “ habitâ ratione oneris impositi eidem vicario; interdum ex constitutione
 “ modicæ pensionis; interdum ex pactione, quando priores vel illi qui præ-
 “ sentant vicarios cum illis paciscuntur, ut illi pensionem prioribus sol-
 “ vant, et reliquos fructus jussu capiant.”

See also the statutes of 15 R. 2. c. 6. *supra* 10. and 4 H. 4. c. 12. *supra* 13.(o)

Hil. 5 E. 2. *Quare impedit* 165. A vicarage is a thing spiritual, and may not be made without the assent of the patron and parson; and howbeit that a portion be admeasured from the parsonage, this may not be done without the assent of the patron and parson. And the estate of the patron is not changed by the admeasurement of this portion for cure of souls: and with this agreeth 16 E. 3. *Monstrans de fuitis* 166.

40 E. 3. 28. It is agreed, that it lieth in the power of the ordinary with the assent of the patron and parson to endow the vicar, and to increase and diminish the endowment, as there shall be occasion. But, whether the freehold after such endowment, be in the parson or in the vicar, there is some doubt; it being agreed, that anciently the vicar could not maintain any action, insomuch that the freehold was in the parson. But at this day the law is conceived to be contrary. And it may fall upon this difference, where the endowment is by the parson himself, who maketh an actual livery; and where it is made by the ordinary, who hath no power to make a livery.

11 H. 6. 32. A vicarage is a derivative out of the parsonage.

Constitutiones Othobon f. 19. (p) “ Ad sufficientiam beneficii et vi-
 “ carii requiritur, quodd ultra habeat de quanto potest jura episcopalia
 “ solvere, et cætera incumbencia onera supportare.”

(o) These statutes are set-out at length in the manuscript.

(p) I do not find this passage any where in *Othobon's* constitutions.

10 Rep. 42. *Portington's case*.—These words, *ad effectum, eâ intentione, ad solvendum*, or such like, do not make a condition in feoffments or grants, unless it be in the case of the king. 1631.

1 Inst. 204. If a man make a feoffment in fee *ad faciendum*, or *faciendū*, or *eâ intentione*, or *ad effectum*, or *propositum*, that the feoffee shall do, or not do, such an act; none of these words make the estate in the land conditional; for in judgement of law they are no words of condition in the case of a common person. But in the case of the king, the said, or the like, words do create a condition. And so it is in the case of a will of a common person.

33 H. 6. 34, 35, 36, 37. The king granted unto the duke of Bedford, and others, certain possessions parcel of an abbey in France, *ad effectum* that they should grant them to certain women when they were founded and established by the king or others; and holden, that these words "*ad effectum*" in the case of the king do make a condition, and give the king a title of entry. And with this agreeth *Leicester and Heydon's case*, Comm. 399.

M. 16 Ja. In the King's Bench, *Treswallen and Penhule's case*. 2 Ro. Rep. 66. S. C. Upon a special verdict the case appeared to be such: The king being seised of the manor of Dorset, and other lands in the county of Cornwall, 3 H. 7. granteth them unto Sir Thomas Lovell and his heirs, *eâ intentione*, and upon trust and confidence (not comprized in the patent, but found in the verdict) that Sir Thos. Lovell should grant a rent of 50 marks by the year unto one Nicholas Crumer and the heirs males of his body, the remainder unto the king and his heirs; and after the grant of the rent, to convey the said manor and lands unto Sir Richard Egecunbe and his heirs males, the remainder unto the king and his heirs. And there, in respect that the words "*eâ intentione*," and "*trust*" were not mentioned in the letters patent, it was adjudged to be no condition.

P. 16 Ja. *Brett and Cumberland's case*, in this court. The queen 26 Eliz. by her letters patent duly made a lease for 31 years, wherein are these words: "*And the said William Cumberland, his executors and assigns, shall sustain, maintain, and repair the said mills in good reparation, and shall leave them well maintained and repaired at the end of the term:*" and adjudged, that these words in the letters patent of the king would be a good covenant, notwithstanding that it was not the deed of the party; for the word "*shall*" is a word of compulsion; and the patentee, having accepted the lease, is bound unto the agreement specified in the patent. Cro. Ja. 209. 521. 1 Ro. Rep. 359. 2 Ro. Rep. 63. Popin. 136. 3 Bulstr. 163. Godb. 276. S. C.

13 H. 7.

1631. 13 H. 7. 22. Litt. § 378. Upon the grant of the office of a parkership, there is a condition in law *tacite* annexed to it, that the parker shall exercise the office.

8 Rep. 44. *Whittingham's case*. Conditions in law are of two sorts, by the common law, and by statute law. And conditions in law by the common law are of two sorts, that is to say, grounded upon a confidence and skill, and without a confidence and skill. Conditions in law by statute law are also of two qualities, namely, when the statute for the execution of a condition in law gives a recovery, and when the statute gives an entry and no recovery.

7 Rep. 34. *Nevil's case*. Upon the creation of an earl to one and the heirs male of his body, there is a condition in law annexed, that he doth not commit treason.

38 Aff. pl. 3. Litt. § 383. 26 Aff. pl. 39. A man deviseth his lands to his executors to be sold, and dieth: the executors enter and take the profits, and being offered money, but not to the value, refuse to sell them, but continue the possession, and take the profits to their own use: the heirs of the devisor may enter by force of a condition in law annexed to the estate of the executors, namely, that they ought to sell so soon as they may; and that they ought to take the profits unto the use of the testator, in both of which they have failed.

Supra 158. 11 Rep. 13. *Priddle and Napier's case, the case of Grimes and Smith, Tr.* 30 Eliz. in the Exchequer Chamber. The parsonage of *Lubbenham* in the county of *Leicester*, 22 E. 4. was appropriated unto the abbot of *Sulby*, and no vicar endowed there according to the purview of the acts of 4 H. 4. c. 12. and 15 R. 2. c. 6. But a vicar had in reputation continued, and the rectory, as appropriate continued also: and it was resolved, that the rectory was given unto the king by the statute of monasteries.

Supra 221. Hil. 44 Eliz. *the case of Robinson, the vicar of Kimbolton, and Bedell*. A rectory was impropriate in the time of king E. 3. and a vicar endowed, but no presentation of a vicar by 160 years; and the queen presented by lapse; and her presentation holden good; for the vicarage shall not be intended to be reunited, except some such matter may be shewn, or some presumption of it, for the smallness of the rectory.

Words of
the charter
in the pre-
sent case.

“ *Et ulterius volumus et ordinamus per præsentés quod prædicti duo-*
“ *decim gubernatores et successores sui super appropriatione dictæ ecclesiæ*
“ *et rectoriæ de Exminster vicarium ejusdem ecclesiæ et successores suos*
“ *dotentur cum unâ demo convenienti pro mansione suâ, et congruâ, con-*
“ *venienti,*

"venienti, et rationabili portione sive pensione pro victu et sustentatione
 "eiusdem vicarii et successorum suorum, et pro omnibus aliis oneribus
 "et sumptibus eidem vicario incumbent' supportand' et manutenend'.
 "viz. pro annuali portione sive pensione 12 l. per ann.

"Volumus, quod dicti duodecim gubernatores providerint, seu provi-
 "deri facient, vicario ecclesiæ de Exminster prædictæ unam domum sive
 "mansionem honestam et competentem, quæ quidem domus sive mansio ad
 "eundem vicarium et successores suos in perpetuum pertinebit ad in-
 "habitand'."

And it is to be observed, that 2 Apr. 1 E. 6. the charter of ap-
 propriation was made; 3 Oct. 1583, which was 26 of Eliz. the
 governors, upon the death of *William Leveston*, who died the last
 day of *September* preceding, presented one *Wm. Randall* to be the
 vicar, who was admitted, instituted, and inducted. He had a house
 assigned unto him, and 12 l. by the year paid unto him, but no
 legal endowment until 1 June, 4 Car. and before that time, namely,
 13 July, 23 Ja. the king had presented *Valentine Davy*, bishop of
Exeter, by lapse; so as the endowment was not in a convenient
 time, and, by consequence, the appropriation by virtue of the con-
 dition in law, which the law, and the statutes, and the charter of
 the king annexed unto the same, was dissolved, and a disappropri-
 ation made by the king's presentation.

Ball, Noy, Littleton, and Henden, for the defendant.—They observed,
 1st. that notwithstanding the appropriation was to a lay corporation,
 yet it was to spiritual and good uses: for the end of it (*et res deno-*
minatur a fine) appears in the king's charter to be *ad divini cultus*
augmentationem, ad educationem puerorum, ad sustentationem pauperum:
 and the end of this corporation being for spiritual and good uses,
 it may be well said to be such a corporation to which an appropri-
 ation may be made.

In the Book of Entries, 532. 533. and 33 E. 3. *Ayde de roy* 103.
 it appears, that an appropriation may be made to a dean.

2 H. 4. 10. The abbey of *Saltaſh* (g) was appropriated to *Windsor*
 college. And 6 H. 7. 12. 11 H. 7. 8. & 27, an appropriation
 was made to a college.

3 E. 3. 11. An appropriation was made to the Hospitallers and
 Templars, and they are still Knights of *Rhodes*, who are in *ordine*
militari et in statu laicali, and not in *statu clericali*.

(g) This is stated in the Year Book to be the abbey of *Saltaſh* in the county of *Devon*:
 but quære, whether it ought not rather to be the rectory of *Saltaſh* in *Cornwall*, which
 belongs to *Windsor* college.

1631.

*Qu. If not
Hereford.

33 H. 3. *Rot. patent. membr. 1.* The church of *Hereford** was appropriated to the hospital of St. *Anthony*, and that for the benefit of the poor.

14 E. 2. *Rot. patent. par. 2. membr. 19.* It appears, that an *ad quod damnum* was awarded to inquire what damage it would be to the king for the bishop and dean of the church of *Sarum* *custodi puerorum, &c.*

14 E. 2. *Rot. patent. par. 2. membr. 1.* A licence to the chancellor and university of *Oxford* to purchase advowsons of the value of 40*l.* to them and their successors, *ita quod, &c.*

16 E. 2. *Rot. patent. par. 2. membr. 24.* An appropriation to St. *Leonard's* hospital; with which agrees 3 H. 5.

5 E. 3. *Rot. patent. membr. 5. 11 R. 2.* It appears, that the church of St. *Dunstan* was appropriated to a college for the support of the converted jews, though it was afterwards disappropriated with the consent of all parties, and a pension assigned out of the church for their maintenance.

22 R. 2. *par. 2. membr. 3.* An appropriation was made to the hospital of *Spital*.

Comm. 496. 497. Grendon's case. It appears, that appropriations might well be made to monks and nuns; and yet monks might be laymen; and nuns could not have cure of souls, nor administer either *sacramenta* or *sacramentalia*; but, because the corporation was founded for a spiritual use and purpose, and the cure of souls might be supplied by the vicar, such appropriations were allowed as good in law.

49 E. 3. among the *placita cancellariæ in the petty bag*, it appears, that there was an appropriation to the master of the hospital of the Holy Ghost.

18 E. 1. *placita parliamentaria, fo. 14.* there is an appropriation *basilicæ princip. Aplorum de urbe Lincoln.*

13 E. 1. *membr. 103.* The bishop of *Ely* founded an hospital, and a church was given to it.

19 E. 1. *membr. 25.* The archbishop of *Canterbury*, with the assent of the pope and the king, appropriated a church to the house of ; with which agree 14 R. 2. *membr. 2. par. 1. and 40 E. 2. membr. 43.*

4 E. 3. *membr. 2.* It appears, that appropriations were made to colleges; and at this day several appropriations are enjoyed by *Oriel* college and *Merton* college in *Oxford*, and *Trinity* college in *Cambridge*; and yet colleges are lay corporations. And a great inconvenience

inconvenience would ensue, if the validity of such appropriations were to be questioned.

2dly. It is agreed on all hands, that an appropriation may be made to a spiritual corporation. By the same reason then, that it may be made to a spiritual corporation, it may be made to a temporal and lay corporation. For the difference between a spiritual and a lay corporation is solely in this, that in the former the natural bodies that constitute the corporation are spiritual persons, whereas the natural bodies that constitute the latter are lay persons. But in both cases the corporations of themselves are merely things in imagination, and the form of a body is equally given by the policy of men; and they are in both cases invisible; so that they cannot have the cure of souls, nor administer either *sacramenta* or *sacramentalia*. There is not, therefore, any greater inconvenience or absurdity in making an appropriation to a lay corporation, than there is in making one to a spiritual corporation: for the corporations, *quæ* corporations, are equally and in both cases capable, where the appropriation is made to a good purpose.

50 E. 3. 26. 9 Eliz. Dy. 267. There is an appropriation to the chancellor or treasurer of the church.

4 H. 4. c. 12. There is an express appropriation of the church of *Haddenham* to the archdeacon of *Ely*; and an archdeacon is lay, and *oculus episcopi*.

18 H. 7. *Croke* 48. 21 H. 7. 1. 44 E. 3. 33. 34. There was an appropriation to priors aliens.

3dly. There may as well be an appropriation to a lay, as to a spiritual corporation, if the end of the institution of appropriations be considered. For the cause of instituting appropriations being for the maintenance of hospitality, the relief of the poor, and other charitable purposes, a lay corporation is as capable of these as a spiritual one.

Churchwardens in *London* hold, as a corporation, the tithes of several appropriations. Among the *Originalia in the Exchequer in the Treasurer's Remembrancer's Office*, 28 H. 8. p. 1. Rot. 64. 4. we find appropriations to the commonalty of *Lincoln* for the poor and hospitality; and they actually hold them at this day; for in 29 Eliz. this came in question, and adjudged good.

A lay person may be a prebendary, who is a spiritual corporation. And of late time a layman, one *Pawson*, was dean of *Durham*.

1631.

15 R. 2. Rot. Parl. No. 38. and 4 H. 4. Rot. Parl. No. 52.

prove that there must be a vicar endowed where there is an appropriation; and such vicar will supply the cure of souls, and administer both *sacramenta* and *sacramentalia*, where the appropriation is to a lay corporation, as well as where it is to a spiritual one.

Littleton saith, that it was not of necessity that a monk professed should be in orders, for it was only by accident, and for one in orders to be a monk, a dispensation was requisite. 26 H. 6. *Non-habiles* 13. 2 H. 4. 7. and 3 H. 6. 23.

As to the objection, that notwithstanding an impropriation, the parsonage continues, and the nature of tithes remains the same, and therefore such persons must have appropriations made to them, as may be parsons and are capable of tithes; it appears by 12 E. 4. 13. 19 H. 6. 21. 46 Aff. p. 4. and 18 H. 7. *Croke* 48. that, by the appropriation, the patronage is extinct; and spiritual corporations cannot be parsons any more than lay corporations; and therefore there is no difference as to that. *F. N. B.* 49. 38 H. 6. 31. 6 H. 8. *Croke* 169. 49 H. 6. 16. 4 Rep. 65. Reg. 35. 11 H. 4. 47.

Tithes are not spiritual things in their nature, but are only so in consideration of the uses to which they are applied, and here they are applied to spiritual uses. Although the commentators hold, that tithes are due *jure divino*, yet they say, that the tenth part is due *jure ecclesiastico vel positivo*. *Euremius*, lib. 2. c. 2. *de beneficiis*. *Lindw. de decimis*.

8 E. 4. 13. *N. B.* 41. 43. A layman might for a certain time have tithes, by grant from a parson for years or life, by sequestration or composition.

38 E. 3. 6. 17 E. 3. 51. A layman might prescribe to have all the tithes, as by transaction, when there was a controversy, and so much was agreed to be paid, and no more.

The parson in former times had not all the tithes; but they were divided into four parts, whereof one was given to the parson for his labour; another to the bishop for hospitality; the third was for the repair of the fabrick; and the fourth was for a provision for the poor: and all these concur in the present case.

Modus decimandi is as much spiritual, as tithes are. *M.* 25 H. 3. Rot. 5. *B. R.* *Foliall's case* is the first prohibition I* have ever met with granted upon a *modus decimandi*.

As to the objection, that the appropriation is not good, because made without the ordinary; it may be answered, that to this ap-
2
propriation

ion there was all the concurrence that the law requires. The king is patron; and the king is supreme ordinary; and as he could appropriate in former times without the consent of the prior ordinary; so may the king at this time; he having now the power which the pope then had.

40. 21 H. 7. 1. The king by the common law is capable of spiritual jurisdiction, because *persona mixta*.

de roy 103. Because *sacro oleo unctus*, he is capable of spiritual jurisdiction.

and Student c. 36. He hath the supreme intendency and jurisdiction over all the souls in his realm, and may transfer those cures to

3. *Quare impedit* 19. The king with the patron might appropriate at common law without the ordinary.

4. 10. The king can make a person who is dead in law, a monk, capable of suing and being sued; and also of having a *fortiori* then, he may do so to persons, who are legally in the same, as in the present case.

he power which the pope had is now vested in the king: the pope granted to the Cistercians, &c. to be discharged of tithes and good. So, he used to grant tithes to laymen: at this time the king of Spain holds the third part of the tithes of his kingdom by the pope's licence.

The king may erect new churches, and endow them; as many times 25 H. 8. out of the revenues of the monasteries.

objected, that this appropriation ought not to be allowed, as it is now the labour of parliament to restore all appropriations to lay hands. To that it may be answered, that the mischief in this is not very great. Nor is it clear that the parliament can do all things it would wish to do. I am more

Not;

of opinion, that no appropriation can be made since the statute 13 of Eliz. c. 10. & 20. For there can be now no alienation of benefice with cure of souls, and all grants made by the parson are void. I think also, that if the patron were to appropriate the time of a vacancy with the consent of the ordinary, it would be void, and within the above-mentioned statutes of 13 Eliz. so that no mischief can happen from this in future. But a benefice may be made at this day notwithstanding those statutes. Defects in the patent, if any such there are, are cured by the statute 1 E. 6. c. 8. which confirms the patent. *Adjournatur*.

1630.

Tr. 6 Car. A. D. 1630. B. R.

Halfey v. Halfey. [MSS. Bridgeman.]

Disturbance
in the road
for the car-
riage of
tithes is a
question of
ecclesiasti-
cal conu-
sance.
1 Jon. 230.
S. C.

DEMURRER upon a prohibition; the case was this:—The parson libelled in the court christian for disturbance of the way for the carriage of his tithes out of the close, where they grew, alleging that was the usual way. The defendant there pleaded, that all the parsons of that church time whereof, &c. had used to carry their tithes out of another gate of the same close, which is the usual way for the owner himself for the carriage of his corn out of the said close; *absque hoc*, that the usual way is through the other gate; whereupon the defendant demurred.

Crawley serjt. argued for the defendant, that the determination, which is the usual way for carrying the tithes, is of ecclesiastical conusance, as well as the tithes themselves are; and *qui obstruit aditum, destruit commodum. Littl.* Inclosure of the land is disseisin of the rent; and as 9 *Aff. p.* 19. 26 *Aff. pl.* 17. 3 *E.* 4. 2. are, to divert the water, so that it cannot run to the mill, is disseisin of the mill. In *F. N. B.* 51. *A.* if any of the parishioners disturb the parson or vicar to carry his tithes by the usual ways and passages, the parson may sue in the spiritual court for this disturbance. And at *Reading*, when the term was adjourned there, this very point was resolved accordingly in *C. B.* for the rectory of *Gadden*. And where the jurisdiction is ecclesiastical, the common law will not meddle, though the spiritual court should make a wrongful award, but an appeal lies, as appears by *Dyer*, 5 *Co. Cawdrey's case*, and 18 *E.* 4. 30. 2. The question being upon the usage of the way and concerning tithes, shall be determined in the spiritual court, because prescription in their law differs from prescription in our law. In their law, if the prescription be *cum titulo et per ecclesiam contra ecclesiam* the time of 40 years is sufficient: if *sine titulo*, then it shall be the time of 100 years, which they call *tempus memoriale*: and where the prescription is *per ecclesiam contra laicum*, or *per laicum contra ecclesiam*, there, the time of 20 years is sufficient if it be *contra absentes*, and ten years if *contra presentes*. But our law observes no such difference; but in all these cases prescription must be from time whereof, &c.

Newdigate, on the other hand, for the plaintiff, insisted, that the prohibition well lay in this case, 1st. Because the point in question

is

is upon a prescription for a way for the carriage of tithes, which is *jus mixtum*, and of temporal conufance. If a man swear a false oath, he cannot be sued in the spiritual court *pro læfione fidei*, because it concerns a temporal matter. 2 H. 4. 10. 20 E. 4. 10. F. N. B. 42. 11 H. 4. 48. and 6 Co. *Marquis of Winchester's case*, where a man devised by his will land and goods; on a suggestion that the testator was *non compos mentis*, the will was not allowed to be proved in the spiritual court, because it imported to concern land. 2. The parson in this case has remedy at common law. Reg. 105. he shall have trespass in such case. 33 H. 6. 11 H. 4. 26. 27 H. 8. 26. where a man has a way over the land of another, and it is stopped, the party shall have an assize of nuisance: but if the publick highway be obstructed, and a man suffer a particular injury by it, he shall have a special action upon the case. 3. The title to this way being by prescription, and the common law prescription differing from that of the spiritual law, as 8 E. 4. 13. and 2 R. 2. 19. it is therefore triable by the common law. F. N. B. 51. As to what has been objected to have been determined in this point, I answer, that our case differs from that case, 1st. Because here the parson is not totally disturbed of his way. 2. It does not appear that this is the usual way, &c. But by *Jones and Hyde*, in the absence of *Whitlocke*, it is *primâ facie* against the defendant; for as tithes are conufable in the spiritual court, so must the ways and passages for the carrying of them, since without such passages for their carriage the parson could not have the fruit of his tithes. And *Jones* said, that he was acquainted with a like case. The bishop of *Bangor*, as parson, was entitled to tithes in the land of *Sir Richard Buckley*, and there were great stones in the road by which they carried out the corn, and though *Sir Richard* could well pass this way, his horses being strong and able, yet the bishop's horses being weaker, could not pass by it, and therefore the bishop sued him in the spiritual court; whereupon a prohibition was granted, but afterwards a consultation was awarded.

At length a consultation was awarded in the principal case by the whole court, and that upon the statute of 2 & 3 E. 6. *Lindwood De Decimis* saith, that the parson must have a convenient way, and that it must neither be craggy, nor swampy. And the spiritual court having conufance of tithes, which are the principal, shall also have conufance of the way through which it is necessary to convey the tithes; for *qui tollit medium, tollit finem*.

I doubted of this case at first; but I afterwards agreed in the judgement.

1631.

Hil. 6 Car. A. D. 1631. B. R.

Ratulins and others v. Wright. [Yelvertonian MSS.]

Tortious
occupier of
land shall
pay tithes.

A MAN took the emblements growing on the land of another: and for the tithes of these the parson libelled him in the spiritual court: and adjudged well, though the party were but a trespasser, because occupier of the land. And so he is liable to answer damages in an action on the statute of 2 E. 6.

Hil. 6 Car. A. D. 1631. B. R. Rot. 784.

James Walrick and Thomas Lewis v. Richard Cropton.

[Yelvertonian MSS.]

If the com-
potion be
general the
vicar shall
not pay
tithes to the
parson.

IN an action upon the case the plaintiffs declared, that whereas on the 1st of July, anno 4 Car. they were proprietors of the tithes of grain then growing and arising from and upon the glebe lands of the vicarage of the church of *Chebsfey* in the county of *Stafford*, and so continued from the said 1st day of July, in the 4th year aforesaid, to the feast of St. *Michael* the archangel then next following: and whereas the said *Richard* afterwards, on the 1st day of July aforesaid, in the 4th year aforesaid, was and still is vicar of the vicarage of the church of *Chebsfey* aforesaid, and then held and occupied, and still holds and occupies 14 acres of glebe land in *Chebsfey* aforesaid, to the vicarage of the church of *Chebsfey* aforesaid then and still belonging: the said *Richard* afterwards (to wit) on the said 1st day of July, in the 4th year aforesaid, at *Chebsfey* aforesaid, in the county aforesaid, in consideration that the said *James* and *Thomas* had then and there demised to the said *Richard* all the tithes of grain then growing and arising from and upon the glebe land of the vicarage of the church of *Chebsfey* aforesaid, for the sum of 22 l. to be therefore paid to the said *James* and *Thomas*, undertook and then and there faithfully promised the said *James* and *Thomas* that he the said *Richard* the said sum of 22 l. for the tithes of the said grain then growing and arising from and upon the said glebe land, of the said vicarage of the church of *Chebsfey* aforesaid, would well and truly pay to the said *James* and *Thomas* when he should be thereto afterwards requested, &c. The defendants pleaded not guilty: it was found for the plaintiffs, and judgement was given and entered for them.

C A S E S.

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them. In which case these two points were resolved—1st. If a vicar be generally endowed of part of the glebe of the parsonage, in that case the vicar shall not pay tithes to the parson, *quia decimas ecclesia ecclesiæ reddere non debet*. But, if the endowment be special, that the vicar shall have so much of the glebe paying to the parson the tithes, this special composition shall bind the vicar: which composition evidenced to a jury by constant payment of tithes to the parson by the vicar shall be intended, though the composition itself be not shewn. 2. If a man lease tithes for years by deed indented, reserving 20 s. annually, action on the case does not lie for these 20 s. but debt: for though it be not properly rent, but in the case of the king, *Dy. 876.* yet it is a sum in gross of so high nature that no action on the case lies for it, but debt upon the contract. 5 Co. 3. a. *Jewell's case*. But, if it be without deed, then this action well lies: for it is not properly a lease, because it cannot be without deed, being of tithes. *Dy. 117. pl. 72.* nor is it an annual sum in gross in the nature of rent; but it is only an executory contract on a reciprocal assumption, which shall be intended in our case.

1631.

Hil. 6 Car. A. D. 1631. B. R. Rot. 132.

Robinson v. Jo. Brooke. [Yelvertonian MSS.]

UPON evidence at bar it was agreed, if the vicar prescribes or shews a composition that the parson used to have only the tithe of corn, there, the vicar shall have the tithes of rape-seed and other new tithes, as wood, hops, &c. but, if the vicar have only the small tithes, the parson shall have them, and not the vicar.

[This case is thus reported by Sir O. Bridgeman.]

P. 7 Car. B. R.

ROBINSON, the vicar, brought an action on the statute of 2 E. 6. for subtraction of tithes against *Brooke* and *Wood*, lessees of the parson of the same church, which was in *Kent*, and declared, that the vicar, from time whereof, &c. had all the small tithes, and that the parson had no other tithes but those of corn, and for subtraction of all the rape-seed which amounted to 40 l. this action was brought, and issue being joined upon *nil debet*, the evidence was

H H 4

given

1631. given at the bar. And *Henden* serjt. for the defendants, said, that rape-seed was but lately used in *Kent*, within these twenty years, and therefore could not be within the prescription. It is also in the nature of grain, because the land is ploughed for it, and it is sown as corn. But *per cur.* (*absente Whitlock,*) the vicar shall have it, because it shall be intended upon the first composition that the parson should have only the corn, and rape is not corn, but it shall be among the small tithes, and the prescription being for those, this shall be included. And so of hops, and woad for dying, which are of late use,

M. 7 Car. A. D. 1631. In. Scac.

[MSS. Turnor.]

Suit lies on the equity side of the exchequer either for tithes or a modus. But parson and vicar cannot join in one bill.

THE farmer of the impropriate rectory of *Pancras*, and the vicar of that church join in an *English* bill in the exchequer chamber, against several owners of several lands in *Kentish Town*, which is within that parish, and suggest divers modules to be paid, some of them to the parson, and some to the vicar, and that the defendants have refused to pay them to the farmer of the parish and to the vicar, and that they have preferred this bill to avoid multiplicity of suits. The defendants demurred to the bill. 1. It was agreed, that a suit for tithes or a modus may be in this court. 2. The second doubt was, whether the farmer of the parsonage and the vicar can join in one suit for their several duties; or, whether they ought to prefer several bills. And *per Denham* and *Weston*, barons—They ought to prefer several bills, because the inheritances are now several and divided, though the vicarage originally was derived out of the parsonage: but it seemed to *Davenport*, C. B. that they might join in a bill in equity. But afterwards in his absence the demurrer was allowed, and the plaintiffs were ordered to prefer several bills,

H. 7 Car. A. D. 1632. B. R.

Lockin v. Davenport. [MSS. Yelvertonian.]

Vendee of grafs before it is cut down must pay the tithe.

A MAN sold his grafs to *A.* before it was cut down. The parson sued the vendor in the spiritual court, who pleaded the sale in that court, which plea not being allowed there, he had a prohibition upon the statute of 2 *E. 6.* because the owner of the grafs ought to discharge the tithe.

Tr. 9 Car. A.D. 1633. B. R.

Andrews v. Lane. [MSS. Bridgeman.]

A PROHIBITION was moved for by *Calthorpe*, who had drawn his suggestion according to the direction of the court. It consisted of two points, 1. that by the law of the land no tithes shall be paid for the second cutting of woad: 2. that great costs are requisite to the planting and sowing of the land with woad, and gathering it in baskets after it is cut; in consideration whereof a custom has always prevailed, that the parson shall take the tenth basket of the first cuttings for all the tithes due for the whole year. And he cited *Co. Entr. 459. Baxter and Hope's case (r)*, as a precedent in point.

Richardson C. J.—For the aftermath of grafs no tithes are due by the law of the land, and many prohibitions have been granted upon that point, *quod fuit concessum*.

Calthorpe cited the case of *Aubrey v. Johnson(s)* 43 *Eliz.* to be so resolved: but *Richardson C. J.* said, that perhaps there might be a difference between the case of aftermath, and this of woad. And if you may prescribe in the custom to pay the tenth of the first cutting in discharge of the whole, though this may be a good custom, yet the cutting must not be fraudulent, you must not cut only a small part at the first, and leave the greater part, and that of the greater value for the other cutting.

Jones J. to *Calthorpe*.—How can you allege in your custom that woad has not been used in *England* time out of memory? *Calthorpe* answered, it is good enough, as in the case of saffron.

Berkley J.—The case of lattermath differs much from that of woad; for the tithes of the aftergrafs are worth little or nothing, but the second cutting of woad is commonly better than the first.

The court appointed the case to be argued the next week. It was therefore afterwards argued by *Noy*, the king's attorney general,

Qu. Whether a custom to take every tenth basket of the first cutting of woad in discharge of the tithes of the second cutting be good, in consideration of the expence and trouble attending the cultivation and gathering of it.

(r) 2 Brownl. 30. 2. Bulstr. 239. Co. Entr. 459.

(s) The case of *Johnson v. Aubrey*, was as follows. *Aubrey* brought a prohibition in the king's Bench against *Johnson*, parson of *Burghfield* in *Berkshire*, who sued him in the spiritual court for the tithes of the aftermath of grafs: and the suggestion in the prohibition was, that the occupiers of meadow ground within the parish have used to make the first vesture into hay, and pay the tenth cock thereof, in satisfaction of the tithe of such first vesture, and of the aftermath likewise. And it was adjudged to be a good prescription, and the prohibition stood. And in this case one *Nichol's* case was cited, where it was adjudged, that tithes shall not be paid for rakings, unless they are covinous rakings, in order to cheat the parson. *Moore* 910. *Cro. Eliz.* 663.

that

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that no prohibition should be granted. The suggestion, he said, consisted of two parts, 1. that by the law of the land no tithes are due of the second cutting, because no tithes are to be paid for the same land in one year: 2d. it suggests a particular custom, that in respect of the great costs and charges which the farmer sustains in the buying of the seed, and ploughing the land for it, and in respect that when it is ripe, and, that then *maturis temporibus anni* he gathers it, and buys baskets to put it in, and purges and cleanses it from the dirt, and that he does all this at his own costs, therefore that by reason of the premises and by the law of the land he ought to be discharged. Now this is merely a prescription *in non decimando*, and no such custom is allowed by the law of the land. But the contrary is frequent about *London*, where the same land is often twice sown in a year, for instance, at one time with peas, and at another with carrots, &c. and yet tithes are paid for both. They might as well prescribe, that if a man gather part of his apples at one time, and part at another, that he should be discharged of tithes of the second gathering. So, if the osiers which grow here on the banks of the *Thames* are cut down, tithes are paid as soon as they are cut. For if there is a double increase, why should there not be double tithes? And as to the case of aftermath which has been objected, clearly, aftermath is not discharged of tithes by the law of the land; but a difference has sometimes been taken, that upon a collateral prescription to give to the parson a reciprocal recompence, as to make the first math into perfect hay, when of right they need only make it into grass cocks, this will be a good prescription to be discharged of the tithes of the aftermath; but without such a prescription or recompence, it is not discharged. But here that which is shewn, that the farmer puts the woad into baskets, is no more than he ought to do of common right, and than is necessary for the severance of it from the nine parts; for he could not suffer it to lie upon the land to be severed. But, if he had prescribed, that from time whereof, &c. they have used, in consideration that they dried the first cutting, and ground it in the mill, and paid it in the ball, to be discharged of the tithes of the second cutting; that would be perhaps a good prescription: for he would do more than of common right he need do. In the 41 of *El.* in lord *Roper's* case, in the isle of *Thanet*, where tithes were paid of apples, and afterwards in the same year the apple trees were shredded, and cut, and sold, it was adjudged, that new tithes were to be paid for the trees. In the case of aftermath, the second cutting is worth little or nothing;

thing; but in the case of woad, the second cutting is worth more than the first; and inasmuch as the second cutting is but an excrescence of a new thing out of the same root, I conceive that new tithes are due for it.

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Richardson C. J. *Jones and Berkley* seemed against the prohibition, and *Jones* said, that woad being within time of memory first used in this realm, he did not see how they could prescribe in this manner respecting it, so that he gave *Calthorpe* a further day.

It was afterwards argued by *Bare* of the *Middle Temple* in support of the prohibition. As to the case of lord *Roper*, he said, cited by Mr. Attorney, I answer that the apple-trees there were dead trees. He then cited *Baxter and Hope's case*. As to the case of corn and hay, and afterwards of carrots upon the same land, as here about *London*, I answer, that there are several crops; but here it is but part of one and the same crop. As to the osiers upon the river *Thames*, I say that the reason of that is in respect of the covin. Then in the case at bar, no tithes should be paid of the second cutting for two reasons: 1st. because you shall not have tithes twice in one year of the same thing; and upon that ground the case of lattermath has been often determined: 2d. because here is more done than the parishioner ought to do of common right, and therefore it is a good *modus decimandi*. In *Ellis's case*, in 16 *Ja.* in consideration of putting the hay of the first math into windrows, and tedding and shaking it, the farmer prescribed to be discharged of the tithes of the second math; and held good; and there it was agreed, that no tithes shall be paid of stubble after tithes have been paid of the crop. So, it was resolved in this court, that where corn is severed, and tithes are paid for it, and afterwards grass grows, and beasts feed upon the same land, that no tithes shall be paid either for this grass, or the pasturage. In *Tr. 7 Car. C. B. Rot.* 1449. a custom to pay the tenth pound of wool was holden a good *modus decimandi*, because the owner is not bound of common right to weigh it. [*Jones J.* this last case was left doubtful.] In *Gibson and Trot's case*, 15 *Ja. B. R.* one prescribed that in consideration that he bound up his corn in shocks, he hath always used to be discharged of the odd shocks, if there were any; and held a good prescription. [*Richardson C. J.* doubted of this.] The cases cited are still stronger than this: for here this woad is part of the same crop. And as to the objection that woad has not been in *England* from time whereof, &c. and therefore there can be no prescription in a *modus decimandi* for it; I answer, that woad has been common here for 50 or 60 years,

1633. years, and then I say if they have used to pay the tithes of it in this manner but ten years, that is a good prescription for the church in the spiritual court upon the *modus decimandi*, and therefore if the farmers shall not avail themselves of the same prescription, they will be twice charged, once with tithes in kind, and again according to the custom.—*Calthorpe* said, that they could prove that woad had been used here for 100 years or more. He added, that the second cutting of woad is but *quoddam derelictum super terram*, as the rakings, &c. and that it is a thing of no, or, at least, very little, value.

Palmer argued on the other side.—There are in our law some things which are not tithable, as quarries, coals, &c. But, where the things themselves are *res decimabiles*, there our law does not allow of any prescription *in non decimando*. As to the first part of the suggestion, that no tithes shall be paid of one thing twice in a year, I utterly deny it altogether, and I vouch *Plowden's Comm. Soby and Molins's case*, where tithes were held payable for the loppings of horn-beam-pollengers, and also for the trees themselves, if they were cut down the same year. So *Dr. and Student, cap. ult. and 43 El.* between *Aubrey and Johnson*, where a difference agreed touching the aftermath, namely, that where the prescription is to make the first math into perfect hay, there, it is a good *modus decimandi* for the second math, because there, there is a reciprocal benefit to the parson: it is otherwise, where it is to make it into grafs cocks, for this is the parson's due of common right. *Tr. 3 Car. B. R.* one libelled in the spiritual court for the wool of rotten sheep, and a prohibition was prayed, upon a suggestion that he had paid tithes for the wool at sheering time, and therefore ought not to pay them again the same year; but it was determined to the contrary; and it was also agreed, that in that case if he had sold the sheep after sheering time, he should pay tithes for their wool *pro rata* before the sale. In *Lyndw. 141. b. 142. ver. "renouventur,"* he says, "*Si eadem terra bis vel ter seminata fuerit, vel sæpius fructum produxerit, dandæ toties sunt decimæ.*" So, of pigeons, and other creatures which breed often in a year. As to *Baxter and Hope's case*, that tithes shall not be paid of, &c. it is true, the court there did not grant a consultation because the rewine grafs is a thing of no value; 2dly. it is by manuring the land to make it more fertile, being converted into dung: and 3dly. for the maintenance of their sheep.

As to the second part of the suggestion, that here should be a *modus decimandi*, I say that here is no recompence or consideration to
the

the parson, and I refer to *Hall and Fettiplace's case*; there, there was a prescription to pay tithe cheeses between such a day and such a day to be discharged of all other tithes of milk in that same year; and adjudged a good prescription, because of common right the parishioner is not bound to make the milk into cheese. But it was resolved, that if the prescription had been, that in consideration he paid the tenth quart of milk between such a day and such a day, that would not have been good, for it is no more than he must have done of common right. The second cutting is of as great value as the first cutting; and woad being but a new thing, there can be no prescription respecting it.

Qu.

Maynard acquainted the court, that in the case of the tenth pound of wool, cited by *Mr. Beare*, he was of counsel, and that they had a consultation, contrary to what *Beare* had said; to which *Jones J.* agreed.

Richardson C. J.—I consider this a very great and doubtful case; for I cannot conceive how payment of a part should be a satisfaction for the whole, and in effect this is so; and the second cutting being as good as the first, it would be a plain *non decimando*. As to the cases that have been put, to the contrary, I will agree to some of them. 1st. As to the case of the stubble, I agree that no tithes shall be paid of it, 1st. because tithes were paid of the corn, which is the principal, and the stubble is of no value; 2d. because in the case of stubble, there is no second renewing. As to the case of fruits, as apples, &c. I conceive that two tithes are payable. As to the aftermath, I agree in the difference that has been taken by *Palmer*, and I will mention a case in the *C. P.* which arose in *Cambridgehire*:—One prescribed, that where the grass grew in a wet place, in consideration of his carrying it out of such watry ground, and to another drier place to make it into hay, he was to be discharged from the tithes of the aftermath; and held to be a good *modus decimandi*. As to the case of the grass which grew after the corn was severed, it might be perhaps, that there were no tithes of it, because of such small value. But in the case at bar, there is a new increase, and the law is, that *de omnibus renovantibus et crescentibus*, &c. tithes shall be paid. And as to the rakings, I hold that where the rakings are of great value, or if they are left on the land continuously, that tithes shall be paid of them; but if they are left there in a small quantity and involuntarily, it is otherwise; and therefore the words of the suggestion in such case are *minus voluntariè*. So it was now lately resolved in this court for the locks of wool

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wool of sheep at sheering time upon this same distinction, where they are left in great quantity, or by covin, and where not. This case shall be argued next term; and if the court should then have any doubt, it shall be afterwards argued by the counsel on both sides, and the court will deliver their opinions *seriatim*.

Jones J. said, that he intended to have spoken to this, but that he subscribed to the rule of the chief justice.

Croke and Berkley accordingly; and they added, that notwithstanding what had been said, they were strongly of opinion, that no prohibition ought to be granted, and so they had been always, else they would not have consented, that the party should be delayed of his prohibition so long as *Michaelmas* term.

Jones J.—If apples are gathered, part at one time, and part at another, there is no doubt but upon these several gatherings, there shall be several tithes paid.

Richardson C. J.—Here at *Fulham* they have peas which are early ripe, and sold at *London*, for which they pay tithes, and yet at harvest, when they cut down the remainder, new tithes are paid.

Croke J. agreed the difference which had been taken touching the aftermath by *Palmer*: and he said, that in this case the baskets are things of necessity for the use of the owner of the nine parts, and the second cutting is nearly as good as the first by the confession of the party himself. And as to the rewine, and rakings, and locks of wool, he took the distinction made by the chief justice, for *de minimis non curat lex*; *aliter*, if in great quantities or by covin. And *Jones J.* was of opinion that there should be no prohibition; for the providing of the baskets was for their own use; that they might as well prescribe to be discharged of the tithes of corn, because they were at the charge of providing scythes to cut it down. Which *Berkley* agreed to, and said, that of pigeons and hens, and such creatures as bring forth twice in a year, double tithes are paid.

Richardson C. J. hesitated about agreeing to the case of others put by Mr Attorney.

Jones J.—If you could make this the custom of an entire county, *consuetudo patriæ*, you might then prescribe in a *non decimando*, as in the case of the *Wealds* of *Suffex*; *quod fuit concessum*. Adjourned to *Michaelmas* term, and no prohibition *interim*.

M. 11 Car. A. D. 1635. B. R.

Sydown v. Holmes. [Sir W. Jon. (1) 368.]

THE prior of *Bredfall(u)* was seised of lands in the parish of *Bredfall* before time of memory, and all the priors held them before time of memory exonerated from the payment of tithes: the lands came by dissolution to king *Henry* the eighth by the statute of 27 *H.* 8. the abbey being under the value of 200 l. *per annum*; the king made a grant of the lands, and by mesne conveyances they came to one *Bentley*, who leased them for years to *Sydown*. *Holmes*, the parson of *Bredfall*, sued *Sydown* in court christian for the tithes; and a prohibition being obtained upon this surmise, the parson demurred to the declaration, and prayed a consultation.

The case was argued at the bar several times; and this term it was argued upon the bench by the justices. Three of them, namely, *Brampsstone*, *Jones*, and *Berkley*, agreed for the defendant, that a prohibition did not lie. *Croke e contra*.

The case was divided into two points.—The first was this: a priory holds lands exonerated of tithes by prescription: the lands come to the hands of a layman: afterwards, the priory is dissolved: whether the tenant of these lands shall have the benefit of this prescription without the aid of any statute or act of parliament? The second question was, whether lands of an abbey, which came to the king by the statute of 27 *H.* 8. and were exonerated of tithes in the hands of the prior by prescription, shall be exonerated in the hands of the king, or of his patentee, by the statute of 27 *H.* 8. or the statute of 31 *H.* 8.?

As to the first point, all the judges unanimously resolved, that there were three manners of discharge from tithes without the aid of any statute, *viz.* by privilege or bull; 2. by real composition and prescription *in modo decimandi*; 3. by general prescription *in omni decimando*. The first, namely, by privilege, was confined to the Templars, the Hospitallers, and Cistercians, who were exonerated

(1) This case is likewise reported by *Croke*, [*Cro. Car.* 422.] but Sir *Wm. Jones's* relation is more natural, more simple, and more circumstantial.

(*) The priory of *Brisfol*, *Breydesale*, or *Bredfall*, in the parish of *Bredfall* or *Breadfall*, in the county of *Derby*. In Sir *Wm. Jones's* Report it is called *Breadfall*, and in *Croke's*, *Brisfol*; easy mistakes from the similarity of sound

by

1635. by a general council (as it seems); for it is said by *Panormitan*, *capite ex parte decimis, Quod privilegium non solvendi decimas datur in apice juris canonici Cisterciensibus, Hospitalariis, et Templariis solummodo, et non aliis monachis quibuscunque.* 2. Several abbies were discharged by the pope's bull, sometimes granted to an order, as to the *Præmonstratenses*, or to a particular abbey. These were personal privileges, *et omnia personalia privilegia* (as *Panormitan* there saith) *certam habent interpretationem, et non transeant de unâ personâ ad aliam.* If therefore a corporation which had such a privilege was dissolved, or its lands were granted over to another, the privilege was gone, and the grantee or feoffee of the lands must pay tithes.

The second discharge is by real composition. This, as it appears in the *Register* 438. and *F. N. B.* 41. 43. is, when a sum of money, or lands, are given to a person by the assent of the patron and ordinary, in recompence of all manner of tithes; there, the land is discharged of tithes in *specie*, and the *modus* is made tithes: and if the lands are transferred or granted to another, the feoffee or grantee shall have the benefit of it: and upon the ground of a real composition, a *modus decimandi* by prescription is maintainable upon a presumption that there was a real composition, which is lost. *F. N. B.* 41. *Registr.* 38. 8 *E.* 4. 14. and 2 *Rep. Bishop of Winchester's case*: and of such a prescription any one, who has the land, shall take advantage.

The third is a discharge *in non decimando*, either in *specie* or otherwise, by prescription, of which an ecclesiastical person only was capable, as appears in *the Bishop of Winchester's case*: for a layman, by the council of *Lateran*, was not capable of tithes either in perannancy, or in discharge; but an ecclesiastical person was capable of both, and was not bound by that council.

Thus far all agreed; but *Berkley* went farther, and said, that the prescription must be intended to have been either upon a privilege, or upon a real composition before time of memory. Privileges were the more frequent; the other was rare: in the present case, therefore, it must be presumed that it was founded upon a privilege in the beginning; and if so, it will follow the nature of the beginning, namely, a privilege; and all privileges, as was said before, were personal, and were extinct with the person, and therefore the prescription shall be extinct. And so he held, that in this case the prescription was personal, and extinct by the dissolution of the corporation, and could not be extended to the king or his patentee.

And

And *Croke* agreed, that if it must be presumed to be upon the ground of privilege, that then it was gone; but he said, that it shall be presumed to be upon a real composition, and then the tenant of the land shall have the benefit of it. But he gave no reason to shew, that such presumption ought to be made.

Jones agreed to the ground taken, namely, that if the prescription shall be intended to be upon the idea of a privilege, then the prescription was gone, and determined with the person. And *Brampston* agreed to this, and that it was a stronger presumption than that it was grounded on a real composition. And *Jones* insisted, that it should not be taken to be upon a real composition; for though a prescription *in modo decimandi* by payment of a sum of money was good upon intendment that it was grounded upon a real composition, for the payment of the sum is good evidence of that; yet in a *non decimando* this does not hold; and so it is resolved in the *Bishop of Winchester's case*, 2 Rep. And *Brampston* and *Jones* said, that there might be an intendment of another sort of the commencement. It is said before, that ecclesiastical persons were capable of tithes in permanency, and of an exoneration from the payment of tithes, and were not bound by any canon or council: that therefore may be the commencement of the prescription; and if so, it is personal, it is tied to the church, *et non egreditur personam*: when therefore the land comes to the hands of a layman the prescription is gone. *Jones* added, that inasmuch as a layman is not capable of a prescription *in non decimando* in himself, nor in his ancestor, he cannot be capable in a *que estate*. So that the three justices held, against the opinion of *Croke*, that the privilege of prescription was gone by the dissolution of the abbey.

As to the second question, they divided it into two considerations; the one, upon the statute of 27 H. 8. only; the other, upon the statutes of 31 H. 8. and 27 H. 8. conjointly.

Croke held, that by the statute of 27 H. 8. this privilege by prescription, as well as all other privileges and exemptions from tithes, was reserved, and given to the king by the words of the act. It gives "all rights, and interests, and hereditaments, and that in as large and ample manner as the abbots held them;" and this privilege was "an hereditament, and a right, and an interest;" and the lands were given "in as large and ample manner as the abbot himself had them;" and he held them discharged of tithes. And farther, the intention of the act was to give the privilege for

1635. these abbies, as well as other abbies, which came to the king by 31 H. 8.

The three other justices held, that this privilege was not preserved nor given to the king by this statute, for the words of the statute being general do not extend to this particular privilege, which is not any thing in *right*, or *interest*, nor properly an *hereditament*; but a matter of discharge merely. *The Marquis of Winchester's case*, 3 Rep. proves this, where these words, "*right, interest, hereditament, and in as ample manner*" in an act of parliament, do not extend to a writ of error, or right of action. 2. No such intent appears in the statute; for if the legislator had had any such, there would have been a clause of exemption, as there is in the statute of 31 H. 8.

Croke also held, that admitting that this privilege is not preserved and given to the king by the statute of 27 H. 8. yet, taking the statutes of 31 H. 8. and 27 H. 8. together, it is saved; for, 1st. the words of 31 H. 8. extend to it. 2d. If not, it is within the equity of it. As to the words, abbies under 200 l. *per ann.* were not dissolved until after the end of the parliament of 27 H. 8. and then the words of the 31 H. 8. extend to all abbies that came to the king after 4 Feb. 27 H. 8. 2. Although in fiction of law, a statute shall have relation to the first day of the parliament, yet, in truth, nothing is settled, nor is it a perfect statute, until the parliament is ended, and that was after the 4th of Feb. 27 H. 8. so that the words of 31 H. 8. extend to it: and the king shall not have the mesne profits accruing between the commencement of the parliament and the end of it. 3. The words of 31 H. 8. are in the purview "*all abbies*," without distinction. Farther, admitting that the words do not extend to this privilege, yet it shall be within the equity of the act. For it was the intention of the statute of 31 H. 8. to give the king equal benefit of the abbies given by the 27 H. 8. as of those given by 31 H. 8. and all were within the survey of the court of augmentations; and it was to encourage purchasers, which goes as well to the one as to the other. And, lastly, *Croke* insisted upon contemporary exposition, and said, that several prohibitions(x) were granted upon these statutes in the beginning of

(x) The cases referred to by *Croke* are stated in his report, and are 7 Eliz. Ret. 254. and *Hayant*, in B. R. P. 27 Eliz. Ret. 328. *Cogull* and *Fairfax*, in B. R. P. 37 Eliz. *Smith* and *Paterfon*, and in 40 Eliz. Ret. 679. *Berry* and *Walter*, which is the same case with that which is called *Berry's* in the text; in all which prohibitions were granted upon the surmise that the lands came to the crown by the statute of 27 H. 8.

Queen Elizabeth's reign, and constantly afterwards, and in this case now in question, between *Berry*, the owner of this land, and the parson, a prohibition was heretofore granted; whereupon he concluded, that this privilege was preserved either by the words of the statute of 27 H. 8. or by the equity of it; and if not by that statute, yet, by a conjunction of the statutes, it is given by the words, or by the intent of 31 H. 8.: for the clause of exemption from tithes in 31 H. 8. does not in words extend to monasteries dissolved after the 31 H. 8. but only to those dissolved before, and yet, (as it is resolved in *the Archbishop of Canterbury's case*, 2 Rep.) this clause of exoneration from tithes in 31 H. 8. extends by equity to monasteries dissolved afterwards.

The three other justices were of the contrary opinion in both points, namely, that the clause of discharge from tithes in 31 H. 8. does not extend either by the letter, or the intent of it, to monasteries dissolved by 4 Feb. 27 H. 8. *Berkley* insisted upon two reasons; the one, that the right of tithes *de mero jure* belongs to the parson of the parish; and when the abbies were dissolved by 4 Feb. 27 H. 8. the right of tithes was revived to the parson; and those things which are extinct cannot be revived by the general words of the act of 31 H. 8. 2. He held, that the parson was within the saving of the 31 H. 8. for he is not within the exception of the saving, namely, "donor, founder," &c.

Jones did not rely (as he said) on these reasons; for, if monasteries were spoken of, this extends to abbies dissolved after 27 H. 8. and before 31 H. 8. as well as to abbies dissolved by 27 H. 8.; and the words too of the act are express to give a discharge of tithes; all discharges were within the intention of the act. And 2. the clause of exemption is after the saving; and the saving extends only to things before.

Brampston C. J. said nothing to this; but they all agreed in one thing, that the 31 H. 8. does not give any aid in this case; for the statute speaks in express terms of monasteries after the 4 Feb. 27 H. 8. which came to the king; and the clause of exemption was intended for those abbies, which came to the king by force of that statute, and not to other lands that were given to the king before or afterwards by another act of parliament; as was resolved in *the Archbishop of Canterbury's case*, 2 Rep. for *Maidstone* college.

Jones answered *Croke's* reason: 1. That the abbies were not dissolved until after the statute of 27 H. 8. and he said, that the

1635. statute of 27 *H. 8.* adds a much stronger clause different from 34 *H. 8.* The statute of 27 *H. 8.* gives to, and vests in, the king all abbies and their possessions, that were under 200 l. *per annum*, and by that the king had them in actual possession without any other act or thing to be done; and some of the abbies too were dissolved within a year before, and given to the king by the act in possession. But the 31 *H. 8.* we see, does not give any abbies to the king, but only vests in the king the actual possession of all abbies which were surrendered, or should be surrendered; and without such surrender they were not given to the king. But *Jones* said, that though this be true in the general, yet the statute in particular cases gives the lands of abbies to the king, as of those abbies which were of the donation or foundation of common persons, the lands of which would by the dissolution escheat to the founder, if there were no act: but the statute of 31 *H. 8.* gives the lands to the king in that case; so that *Croke's* first objection is answered.

As to the relation of the act of parliament, they said, that it shall have relation to every purpose to the first day of the parliament, and shall vest the land that day in the king, and the king shall have the mesne profits from the first day of the parliament. And this was agreed by several authorities; *vide Partridge* and *Croker's* case in *Comm.* 33 *H. 6.* *Pilkington's* case, &c.

And *Jones* said, that the words of the act go only to abbies dissolved after the 4 *Feb.* 27 *H. 8.* for the preamble of the act speaks of divers abbots, priors, &c. of the said monasteries and priories; and there is no mention of any other monasteries but those which were dissolved after 4 *Feb.* 27 *H. 8.* and though in the beginning the words are general, *all* monasteries, priories, &c.; yet that is restrained; for the patentees shall hold the land exonerated of tithes free as the *said* abbots and priors held them; and the *said* abbots are only the abbots of the *said* houses mentioned in the preamble, and those were abbies that were dissolved after 4 *Feb.* 27 *H. 8.* And as to the case urged, that the said clause was taken by equity, out of the *Maidstone* college case; that was for another reason; for there, though the abbies were dissolved after 31 *H. 8.* yet those were vested in the king by that act; and it was the intent of the statute to give equal benefit in monasteries dissolved after, as to those which came to the king by, that statute. But here, there does not appear to be any intention to extend this clause to another act of parliament made before, no mention

being made of that act, but there being rather an absolute exclusion.

As to contemporary exposition, and precedents, they answered, that the rule of contemporary exposition does not hold *in omnibus*: for in the *Archbishop of Canterbury's case* the contemporary exposition was *e contra*, but there was no express resolution on the point until that time, and upon great debate the exposition was altered. And in our case there is no resolution *e contra* before. And as to precedents, it was answered, that many of these points pass *sub silentio*, but there is no direct judgement on the other side. It was resolved and adjudged in *Wright and Gerard's case*, 18 *Ja. C. B.* that the statute of 27 *H. 8.* does not preserve the privileges of exemption from tithes: and 31 *H. 8.* does not give or preserve any such privileges in case where abbies came to the king by the 27 *H. 8.* In the same manner both these points were resolved in the exchequer, 4 *Ja. in the case of Ward and Clarke.* And in the argument of *Weston and Whitton's case* in this court, it was agreed accordingly by *Hyde, Dodderidge, Jones, and Whitlock.* They concluded, therefore, that a consultation should be awarded.

In this case, in short, these points were resolved: 1st. That an abbot or ecclesiastical person may prescribe *in non decimando*: but, when the corporation is dissolved, or, when the corporation grants the land to a layman, such layman shall not have the benefit of the prescription; for it was personal to the abbot.

1st point resolved.

2d. It was resolved *per totam curiam*, that this privilege by prescription, and other personal privileges, by bull or order, belonging to abbies which were under 200 *l. per annum*, and dissolved by 4 *Feb. 27 H. 8.* were not preserved and given to the king by that statute.

2d point.

3d. That privileges by prescription, or by order or bull, are preserved by the clause of 31 *H. 8.* and neither the king, nor his patentee shall pay tithes. But this extends only to monasteries dissolved after 4 *Feb. 27 H. 8.* and therefore the lesser abbies under 200 *l. per annum* which were dissolved by 4 *Feb. 27 H. 8.* are not included within the said clause of 31 *H. 8.*

3d point.

Hill. 11 Car. A. D. 1636. B. R.

Earl of Hertford v. Leech. [MSS. Calthorpe.]

A forest discharged of tithes whilst in the king's hands, in right of his prerogative, is not discharged in the hands of the patentee.

THE plaintiff declareth, that whereas E. 6. 13 July, 1 E. 6. was seised of the forest of *Sauernack*(y) in the county of *Wilts*, whereof eight acres of pasture called *Earl's Heath* are, and time out of mind have been, parcel in fee in the right of his crown of *England*: and whereas the said late king E. 6. and all his progenitors, late kings of *England*, were seised of the forest aforesaid, with the appurtenances whereof, &c. in fee as in right of the crown of *England*, and the said eight acres of pasture called *Earl's Heath* time out of mind had holden and enjoyed acquitted, discharged, freed, and privileged of and from the payment unto the proprietor or farmer of the rectory of *Burbadge*, of any tithes whatsoever, of, from, and upon the said eight acres of pasture, with the appurtenances or any part thereof, yearly for all the time aforesaid growing, happening, renewing, or increasing: and the said E. 6. being of the forest aforesaid, whereof, &c. in form aforesaid seised, and holding the aforesaid eight acres of pasture acquitted, discharged, freed, and privileged of and from the payment to the proprietor or farmer of the rectory of all manner of tithes growing or renewing in the said eight acres, did, on 24 July, 1 E. 6. under his great seal of *England*, grant the said forest, with all liberties and privileges to the said forest belonging, unto *Edward* duke of *Somerset*, and the heirs males of his body; that the said *Edward* duke of *Somerset* died, and the said forest descended unto the said *Edward* earl of *Hertford*, as son and heir male of the said duke; 25 May, 13 Ja. the said earl of *Hertford* made a lease of the said eight acres to *Wm. Noyes* the plaintiff; and that by the statute of 2 & 3 E. 6. it is enacted, that no person

(y) The very same question with respect to the same forest arose in the case of *Noyes* and *Crosse*, Hill. 16 Ja. and it is the declaration in that case which Sir *Henry Calthorpe* recites in the introduction to his argument. The only difference between the two cases is, that in that case the question was between the rector and the lessee of the patentee; in this case, it is between the rector and the patentee himself. Whether the case of *Noyes* and *Crosse* ever received any judicial determination, I know not: the pleadings may be found in *Winch's Entries* 641. I have met with the arguments of *Henden* and *Ashby* serjts. in that case in *Tarnor's* manuscript reports; but they have not enough of novelty or ingenuity to justify my extending the work by the insertion of them.

shall sue or be compelled to give or pay any tithes for any manner of lands, tenements, or hereditaments which by the laws or statutes of this realm, or by any privileges or prescription, were not chargeable with the payment of any tithes, or which were discharged by any real composition; and whereas the said eight acres by prescription time out of mind, by the laws and statutes of this realm, were not chargeable with the payment of any tithes unto the proprietor of the rectory of *Burbadge*, but freed and discharged from the payment of all manner of tithes unto the said proprietor of the said rectory of *Burbadge*; that nevertheless the defendant had libelled against him for tithes.

To this declaration the defendant demurred.

So as the mere question in this case is, whether this was such a discharge of payment of tithes in king *Edward* the sixth, as that the patentee, after such time as the king hath granted the forest to him and his heirs, shall be capable of this discharge of tithes, and shall be discharged of payment of tithes. And I* conceive that it is; for this discharge of payment of tithes of the forest of *Savernack* that was in the king, was a real discharge of payment of tithes, and not a personal privilege; and it being a real discharge, and not a personal privilege, the patentee is as well capable of the same, as the king himself was, during the time that the forest was in the hands of the king. * *Calthorpe*.

M. 11 Car. Sydow v. Holmes. In that great case that was so solemnly argued in this court by all the judges, although it was adjudged, that where the abbey came unto the king by the statute of 27 *H. 8.* and the prescription was, that the abbot and his predecessors had time out of mind been discharged of payment of tithes, yet this prescription would not serve the turn upon the statute of 27 *H. 8.* because it should be taken to be a personal privilege, whereof none was capable but the abbot himself; but, it was there agreed by all, that if the discharge of payment of tithes had been a real discharge, as, if there had been a real composition, or something given formerly in lieu of those tithes; there, the discharge should have gone with the land, so as whosoever had the land should be discharged of payment of tithes; according unto the *Register* 38. and *F. N. B.* 41. *Supra.*

And for the proof that this is a real discharge, I conceive it will be material to shew, that the settling of payment of tithes in this kingdom of *England*, is merely grounded upon decrees and upon councils: for, although tithes were paid in some kind, yet the

1636. settling of parochial rights and the fixing of payment of tithes upon the parson of that parish where the lands did lie, was made by decrees and councils.

Seld. Hist. 81. It is said, that the parochial priests had not at first such a particular interest in the profits received in oblations, as of later time. All that was received wheresoever in the bishoprick, was as a common treasury to be so dispensed. One part was allowed to the maintenance of the ministry, out of which every parochial minister had his salary; another to the relief of the poor, sick, and strangers; a third to the reparation of churches; and a fourth to the bishop. *Concil. Antioch.* 103. & 104. and *Urban* c. 12. q. 2. c. 26. *Synod. Rom. sub. P. P.* c. 5. and *Gelas. Decret.* c. 27.

Id. 80. The word *Parœcia* or *Parish* at first denoted a whole bishoprick, (which is but as a great parish) and signified no other-wise than Diocese; but afterwards was confined to what our common language restrains it. The curates of those parishes were such as the bishop appointed under him to have care of souls in them; and those are they whom the old Greek councils call *πρεσβύτεροι πρεσβύτεροι*, or *οι εν ταῖς χωραῖς*, or *εν ταῖς πρυμναις πρεσβύτεροι*, that is, *Presbyteri Parochiani*, within the bishoprick. These had their parishes assigned them, and in the churches where they kept their cure, the offerings of devout christians were received, and disposed of in maintenance of the clergy and relief of distressed christians by the *Oeconomi*, *Deacons*, or other officers thereto appointed under the bishop. *Concil. Gangr. Can.* 67. and *Chalced. Can.* 204.

Id. 58. *Concil. Matisc. Can.* 5. *A. D.* 586. *Leges divinæ consulentes sacerdotibus ac ministris ecclesiarum pro hæreditariâ portione omni populo præceperunt decimas fructuum suorum locis sacris præstare, ut nullo labore impediti per res illegitimas spiritualibus possint vacare ministeriis; quas leges christianorum congeries longis temporibus custodiret intemeratas. Unde statuimus, ut decimas ecclesiasticas omnis populus inferat, quibus sacerdotes aut in pauperum usum, aut in captivorum redemptionem erogatis, suis orationibus pacem populo ac salutem impetrent.*

Id. 72. *Quicumque decimam abstrahit de ecclesiâ ad quam per justitiam dari debet, et eam præsumptuosè, aut propter munera aut amicitiam, vel aliam quamlibet occasionem, ad aliam ecclesiam dederit, a communi vel a missò nostro distringatur vel ejusdem decimæ quantitatem cum suâ lege restituat.* *Leg. Longobard. Lib.* 3. tit. 3. c. 7. So, another was made against persons under pain of deprivation, that

they should not persuade parishioners to come to their churches, & suas decimas sibi dare. *Benedict. Levita. lib. 7. c. 141.* With which agrees the complaint made about the same time in the council of *Pavia* against such as used to give away their tithes *aliis ecclesiis pro libitu.* And many express examples are of such grants made, not otherwise than as of rents-charge arbitrarily created. *Synod. Ticinens. c. 16. q. 1. c. in sacris Canonibus 56.*

And although out of any continuance alone of voluntary payment, a kind of parochial right (which also by the laws of the time every rector should have enjoyed in the territory where he dispensed the sacraments) were created; yet consecrations of tithes (not yet established by a civil title) made to the church of another parish at the lay-owner's choice, were practised and continued in force; as may plainly be collected out of an old law made (but not put in execution) for punishment of such consecrations by compulsion of the party to restore to the church the quantity of the tithe so aliened.

Linduo. Lib. 3. De locato et conducto, ver. "portiones." *Hæ portiones potuerunt pervenisse ad locum religiosum de concessione etiam laici cum solius diæcesani consensu de decimis vel proventibus quas laicus talis ab ecclesiâ aliâ habuit in feudum ab antiquo. Et hoc verum, si tales portiones decimarum eis donatæ fuerunt ante Concilium Lateranense, quod celebratum fuit anno Domini 1179, tempore Alexandri tertii, qui fuit Senensis. Nam ante illud Concilium bene potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ vel monasterio dare; non tamen post tempus dicti Concilii.*

2 *Rep. 44. Bishop of Winchester's case.*—It is resolved, that a mere layman that was not capable of tithes in pernancy, was yet capable of the discharge of tithes at the common law in his own land, as well as a spiritual man: for, by the common law, the parson, patron and ordinary, might have discharged a parishioner of tithes in his own land; or the parishioner might have given part of his land to the parson for discharge of his tithes in the residue. 8 *E. 4. 14. Register 38.* And there it is said, that it is commonly said in our books; that, before the council of *Lateran*, every man might have given his tithes to any ecclesiastical person that he would.

7 *E. 6. Dy. 84.* A portion of tithes, is, where a man hath any profit of tithes within the parish of another parson or vicar. And the original of it is *ante concilium Lateranense, quo tempore licebat unicuique distribuere et solvere liberè pro libitu suo decimas suas seu aliquam portionem inde cuicunque ecclesiæ secundum meliorem discretionem suam*, and there was no restraint to any church or parish in certain.

So,

Supra.

Supra 123.

1636. So, by continuance it accrued to a right or title; and this was so given for prayer or devotion. 8 *Aff. pl.* 25. doth agree with this, 44 *E.* 3. 5.

10 *H.* 7. 18. Before the council of *Lateran* every man might give his tithes unto any curate; at which time it was decreed by the same council, that from time to time no man should grant or give his tithes, but to his proper curate.

7 *E.* 3. 5. By *Herle*.—The tithes that are out of any parish may not now be granted to whom a man wills; for the bishop of the place shall have them. And it is against reason, that a man may not give his alms unto whom he wills.

Seld. 76. The bishop of *Xaintonge* maintained, that no church lands were to pay tithes to any church. And *Godfrey*, abbot of *Vendosme*, sharply corrects him in an epistle, saying, *Nobis dictum est, quia dicitis, quod ecclesia non debet decimam dare. Hoc verum est, ubi ecclesia nihil habet in parœciâ alterius ecclesiæ; ubi vero ecclesia in alterius ecclesiæ parœciâ possessionem aliquam habet, vel quippiam quod decimari debeat, ibi ecclesia ecclesiæ decimam reddere debet, si illud iuste possidere desiderat.*

Hil. 9 *Ja.* A free school is built upon part of the church-yard of *Paul's* in *London*: tithes shall not be paid of it unto the minister of *St. Faith's**: for *ecclesia ecclesiæ decimas non solvit.*

* See New-court's Repert. vol. 1. 349.

Hil. 37 *Eliz.* *B. R.* A vicar is endowed *de minutis decimis*: he shall not have the small tithes of the glebe of the impropriate parsonage; inasmuch as this was discharged before in the hands of the parson. But, if the glebe come into the hands of a layman severed from the appropriation, tithes shall be paid of it both unto the parson and unto the vicar.

Seld. 112. Infeodations of tithes unto laymen were ordinary until the council of *Lateran* holden 1078, at which time the canon was made, *Decimas quas in usum pietatis concessus Canonica auctoritas demonstrat, a laicis possideri apostolicâ auctoritate prohibemus. Siue enim ab episcopis, vel regibus, vel quibuslibet personis eas acceperint, nisi ecclesiæ reddiderint, sciant se sacrilegii crimen incurrere.* Which in the same syllables is iterated in the general council of *Lateran* holden in 1139.

Id. 117. Princes sometimes joined with the bishop to bring in the payment of tithes, that thereby themselves might have beneficial infeodations of them from the church. But, as princes made infeodations out of their own demesnes, or their own churches, so other private lay persons: and the clergy sometimes of tithes already vested

velled in them, and sometimes, it seems, out of their demesnes.

Schaffrsburg. A. D. 1073.

Id. 284. It appears, that in 11 *H. 3.* a special grant was made by the king, that tithes of hay and mills should be paid thenceforth in all his demesne lands, which before then had not been paid. *Dominus rex*, saith the patent, *de concilio archiepiscoporum et episcoporum suorum concessit, ut decimæ fœni et molendinorum de singulis dominicis suis in regno suo de cætero præstentur. Et mandatum est ballivis de Corsham, quòd de dominico suo de Corsham decimas fœni ecclesiæ de Corsham dari faciant. T. R. apud Westmonast. xlviii. die Maii. Rot. claus. 11 H. 3. p. 1. m. 9. in dorso.* And according to this were divers close writs sent out in the following years, as appeareth by 12 *H. 3. m. 7. in dorso, & claus. 17 H. 3. dorso 16. & dorso. claus. 20. H. 3. m. 24. & claus. 21 H. 3. m. 10.*

Id. 285. 33 E. 1. in the petitions of the parliament, *De persuis et vicariis petentibus decimam in Cornubiâ ubi rex solvit annuatim Episcopo Exoniensi pro decimâ; ita responsum est, Fiat sicut consuevit tempore comitis et regis.* The earl and king here meant are *R. 1.* and *H. 3.*

Rot. Parl. 4 H. 3. m. 1. & claus. 5 H. 3. m. 6. The bishop of *Exeter* had the tithes of the profits or rent of the stannaries there anciently given and paid to him.

Seld. 435. A writ of *Scire facias* was grantable anciently for tithes before the statute of 18 *E. 3. c. 7.* upon patents of tithes legally granted by the king, when against the grant any clergyman by the canon law took them from the patentee.

Id. 436. 21 H. 3. m. 19. Rot. claus. 21 Rot. Parl. 8 E. 2. Rot. 23. Per petitionem in consilio, the abbess of *Godstow* hath a writ directed *Custodi equitii sui de Woodstock, &c.* which relates, that *ex parte dilectæ nobis in Christo Abbatissæ de Godstow per petitionem suam coram nobis in concilio nostro exhibitam, nobis est ostensum, quòd cum per cartas prægenitorum nostrorum quondam regum Angliæ concessum sit ei, quòd ipsam decimam omnium in manerio nostro de Woodstoke, et parco nostro ibidem per annum renovantium percipiat et habeat; prætextu cujus* the abbess and her predecessors had enjoyed it; and that the bailiff kept from her the tithe of the colts bred in the same park; wherefore, it commands him to restore them, if they be so due.

P. 7 Ja. in the exchequer, *Sir Carew Rawleigh* against the vicar of *Gillingham*. The case was thus: The vicar libelled against the keeper of the forest of *Gillingham* for tithes of beasts agisted within the forest of *Gillingham*; and upon a surmise made of the special matter,

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matter, and of the payment of 8s. by the year in satisfaction of all manner of tithe, a prohibition was granted. And it was resolved, that the king was not to pay tithes for any part of his demesnes, except they have used to pay tithes of the same land; and a judgement in 31 *Eliz.* was cited to be accordingly. And the beasts being agisted whilst the forest was in the hands of the king, no tithes are to be paid of it. But, of beasts commoning in the chase of the king tithes shall be paid; and farmers of the king for life or for years shall pay tithes; but not tenants at will of the demesnes of the king.

Hil. 37 *Eliz. B. R.* in the case of the earl of Shrewsbury. A surmise was made, that had been the house of the king, and that the house was out of every parish; and a prohibition was granted upon this surmise.

Seld. 351. Henry the second gives to the church of Sarum divers churches with tithes, and among them, *Ecclesiam de Durnesfordâ, &c. et omnes decimas de Novâ Forestâ, et de Panetot, et de Bucholt, et de Andeverâ, et de Husburnâ, et omnibus forestis meis de Wiltesbire et de Dorseta, et de Berkesbire, de omnibus rebus, scilicet, de firmâ, de pasnagio, de herbagio, de vaccis, de caseis, de porcis, de equabus, et omnes decimas de omni venatione prædictarum forestarum, exceptâ decimâ illius venationis quæ capta fuerit cum stabilia in Forestâ de Windlesborâ, &c.* What the bishop had yearly by reason of this grant, may be seen in *Rot. claus.* 5 H. 3. m. 14. And for grants from the king of the tithe of venison other examples are obvious; as, of the forests of *Essex* to the bishop of *London* by king *John*, and of others anciently, &c. *Rot. Chart.* 6 Johannis, ch. 107. m. 12. 11 H. 3. p. 1. m. 5.—4 H. 3. *Rot. claus.* p. 1. m. 2. and *Rot. claus.* 17 H. 3. m. 4. a grant was made of the tithe of the venison taken in the forests in *Northamptonshire* to the abbot of *Bury*.

Id. 364. *Inter fasciculos petitionum parliament. 6 E. 1. in arce London. Nicholas of Cranford, parson of Gillingham, complained unto the king, Quòd cum foresta domini regis, ibidem sita, sit infra parochiam suam, quòd dominus rex decimam fœni, venationis, pannagii, et aliorum preventuum ipsius forestæ de gratiâ et pro salute animæ suæ, et animarum predecessorum suorum ecclesiæ suæ cui de jure communi debentur plenè solvi præcipiat secundum formam supplicationis et exhortationis apostolicæ porrectæ domino R. apud Gillingham, quando fuit ibi ad natale. What was that supplicatio or exhortatio apostolica? did not some such thing coming from Rome about the time of the council of Lyons, make the monks think it a thing agreed upon ir-*

that council? It seems here too, that, in the king's case, parochial right of tithes was not every where settled, although the tithes were increasing in a parish.

Id. 444. 7 H. 3. Rot. clauf. p. 1. m. 6. The king directs his writ to *Brian de Infula*, keeper of the forest of *Sherwood*, telling him, that *pro salute animæ domini Johannis regis, patris nostri, concessimus monachis de Basingwere, quod percipiant hâc vice usque ad festum S. Michaelis, anno regni nostri vii. decimas de bladis seminatis in defenso nostro inter Blakebroc & Glassop, et ideo vobis mandamus, quod ipsos monachos hâc vice sine impedimento permittatis decimas prædictas percipere.*

Id. 445. So in Rot. clauf. 5 H. 3. p. 2. membr. 14. the bishop of *Salisbury* hath 50 shillings yearly nomine decimæ out of *New Forest*, which *Henry* the second had granted to his church by the name of *omnes decimas de Novâ Forestâ*. Cart. Antiq. C. C. in dorf. 10. in arce London. In Rot. pat. 11 H. 3. m. 5. p. 1. *Eustace*, bishop of *London*, hath the tithe of the king's venison, taken in the forest of *Essex*, according to king *John's* grant, by writ directed unto the foresters and bailiffs of that county.

Id. 446. Mich. 9 & 10 H. 3. Rot. 15. in arce London, in an attachment upon a prohibition by *John Fitz-Robert* against *Philip* of *Arderne*, clerk, in the pleading allows, that for tithe of hay and mills the prosecution in the spiritual court was lawful; but he further saith, that *de decimâ bestiarum forestæ eum implacitavit contra prohibitionem*.—16 H. 3. m. 7. Rot. pat. the king sent his command to the constable of *Windsor* castle, that the church of *St. John* in *Windsor* should have decimas gardini regis de *Windlebores*.

Id. 366, 367. Rot. Parl. 18 E. 1. in Receptu Scaccarii, *Ralph*, bishop of *Carlisle*, petit versus ecclesiæ priorem de *Karliel* decimas duarum placearum terræ of the new assarts in the forest of *Inglewood*, whereof the one is called *Linthwait*, the other *Kirkthwait*, quæ sunt infra limites parochiæ ecclesiæ suæ de *Aspaterik*, &c. and lays by prescription in his predecessors the tithes of the pannage there, before the assarting or culture. *Henry* of *Burton* also, parson of *Thoresby*, claimed in parliament, the same tithes as belonging to his church, & infra limites parochiæ suæ. And the prior comes and says, that *Henricus, rex vetus*, (*Henry* the first, it seems,) concessit Deo et ecclesiæ suæ beatæ Mariæ *Karliel* omnes decimas de omnibus terris quas in culturam redigeret infra Forestam, et inde eos feoffavit per quoddam coram iburneum quod dedit ecclesiæ suæ prædictæ, &c. Whereupon the king's attorney dicit, quod decimæ prædictæ pertinent ad regem, et

Supra 107.

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non ad alium, quia sunt infra bundas Forestæ de Inglewood, et quid rex in Forestâ suâ prædictâ potest villas ædificare, ecclesias construere, terras assartare, et ecclesias illas cum decimis terrarum illarum pro voluntate suâ cuicunque voluerit conferre, eo quod Foresta illa non est infra limites alicujus parochiæ, &c. Et petit quoddam decimæ illæ domino regi remaneant, prout de jure debent ratione prædictâ, &c. Et quia dominus rex super præmissis vult certiorari, ut unicuique tribuatur quod suum est, William of Vespi, justice of the forest beyond Trent, and Thomas of Normanvill, his escheator for those parts, (for so was the division anciently of escheatorships,) were assigned commissioners to inquire of the truth, & certificent regem ad proximum parliamentum. So, as it appears, that the attorney challenged not the soil by prerogative, but only in regard that the place being the demesne land of the crown, and not assigned to any parish, the tithes are grantable by the king, as owner, at his pleasure. And so it well agrees with that liberty claimed by king John in the name of his baronage, that they might found new churches at their pleasure in their own fees, (before the establishment of parochial right in tithes), as also with the more ancient practice of this kingdom, whereby tithes might not be parochially exacted, nor were so reputed due, but by the owners arbitrarily conveyed in perpetual right.

Id. 368. Mich. 5 E. 3. coram rege, Rot. 168. in Cumbria it was adjudged in the king's bench, quoddam de decimis grossis priori de Carlisle et predecessores suis de dominicis domini regis infra Forestam de Inglewood provenientibus, et extra quarumcunque parochiarum limites existentibus per cartam progenitorum domini regis nunc concessis, & per cartam ipsius D. R. nunc confirmatis, &c. a prohibition should be granted against the bishop of Carlisle, that claimed them. It was upon a record sent thither out of the parliament, as in the roll appears largely.

Rot. Parl. 8 E. 2. m. 17. in dorset. Edward the first gave such tithes of the forest of Dean as increased not within any parish to the bishop of Landaff, by which title the bishop afterwards claimed them; and no question was of that point.

Hil. 19 Ja. in the common pleas in the case of Noyes and Crofts it was resolved, that the king was discharged of payment of tithes in the forest of Suvernack during the time that the forest was in the hands of the king; for that he was not bound by the council of Lateran which established the parochial right of tithes. And it was resolved also in that case, that the king might well enough prescribe in non decimando, and be discharged of the payment of tithes, which, as Lindwood saith, is only negatio oneris, inasmuch as the king is

persona mixta, et sacro oleo unctus, according to 33 E. 3. *Aya de roy* 103, and hath the supreme ecclesiastical jurisdiction in him, and is the supreme ordinary that hath the cure of souls, as it appeareth by 5 Rep. 15. *Cawdrey's case*, 27 E. 3. 84. and F. N. B. 34. And, as *Lindwood* saith, the king of *England* hath a spiritual character imprinted in him; and as the bishop hath imposition of hands, so hath the king the sacred unction of oil, and is the fountain of all spiritual jurisdiction. It is to be observed too, that the king is the founder of all bishopricks, and the giver of all temporalities and jurisdiction. The bishop, who had the collecting of all manner of tithes before the council of *Lateran*, which established the parochial right, did not collect any thing of the king; and the king might have given his tithes to whom he would; and if he might give them, he might retain them. Besides the king, who had his chapel and his chaplains in his own family for the administering of the sacraments and the spiritual functions, and did maintain them, had not the same cause for the payment of the tithes of his demesnes, as others had. And *jus præstandi decimas* being, as *Lindwood* saith, *quoddam servitus*, and therefore called *jugum decimarum*, it is not proper for the king, who is not subject unto the doing of any service, to perform this service, unless himself pleaseth.

Lastly, it is to be observed, that for any thing that appeareth, this forest is as ancient as the division of parishes, which was in the time of *Honorius*, A. D. 630, and long before the council of *Lateran*, which established parochial right. And forests, which were only a receptacle for wild beasts, whereof no use was made but only for the recreation and pleasures of the kings of *England*, and in which, by the laws of the forest, there might not be any building of houses, nor tilling of ground, nor depasturing of sheep, were never upon the division of parishes annexed to any parish: for it was in vain to annex them, when there was nothing in them whereof to pay tithes.

Concilia Generalia Bini, T. i. fo. 278. A. D. 260. Epistola Dionysii Papæ 11. ad Severum Episcopum.—Ecclesias vero singulas singulis presbyteris dedimus, parochias et cœmeteria eis divisimus, et unicuique jus proprium habere statuimus, ita videlicet ut nullus alterius parochie terras, terminos, aut jus invadat, sed unusquisque suis terminis sit contentus, et taliter ecclesiam et plebem sibi commissam custodiat, ut ante tribunal æterni judicis ex omnibus sibi commissis rationem reddat, et non judicium, sed gloriam, pro suis actibus accipiat. Hunc quoque
Norman,

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Normam, charissime, te, et omnes episcopos, sequi convenit; et quod tibi scribitur, omnibus, quibuscunque potueris, notum facias, ut non specialis, sed generalis fiat ista præceptio.

Concilium Tridentinum Sessio 24. Bin. Concil. *In iis quoque civitatibus ac locis ubi parochiales ecclesiæ certos non habent fines, nec earum rectores proprium populum, quem regant, sed promiscuè petentibus sacramenta administrent; mandat sancta synodus episcopis pro tutiori animarum eis commissarum salute, ut distincto populo in certas propriasque parochias unicuique suum perpetuum, peculiaremque parochium assignent, qui eas cognoscere valeant, et a quo solo licitè sacramenta suscipiant, aut alio utiliori modo, prout loci qualitas exegerit, provideant. Idemque in iis civitatibus ac locis ubi nullæ sunt parochiales, quam primum fieri curent; non obstantibus quibuscunque privilegiis et consuetudinibus immemorabilibus.*

Concilium Triburienſe sub Formoso Papâ, A. D. 895. c. 13. Bin. Concil. T. iii. pars 2. *De decimis quatuor enim fieri partes juxta canones judicamus, de decimis et oblationibus fidelium: ut una sit episcopi, altera clericorum, tertia pauperum, quarta restaurationi ecclesiarum servetur, sicut in epistolâ Gelasii Papæ, cap. 27. legitur.*

C. 14. *Placuit huic sancto concilio, ut secundum functiones canonum decimæ, sicut et aliæ possessiones, antiquis conserventur ecclesiis, sicut in Chalcedonenſi S. Concilio statutum est, cap. 17. Si quis autem in affinitate antiquæ ecclesiæ novalia rura excoluerit, decima exinde debita antiquæ reddatur ecclesiæ. Si verò in quâlibet sitvâ vel deserto loco ultra milliaria quatuor aut quinque, vel eo amplius, aliquod dirutum conlaboraverit, et illic, consentiente episcopo, ecclesiam construxerit, et consecratam perpetraverit, prospiciat presbyterum ad servitium Dei idoneum et studiosum, et tunc demum novam decimam novæ reddat ecclesiæ, salvâ tamen potestate episcopi.*

Placed by
Binquis about
the end of
the ninth
century.

Concilium Nannetenſe incerti temporis, c. 10. Bin. Concil. T. iii. p. 2. f. 131. *Inſtruendi sunt presbyteri paritèrque admonendi, quatenus noverint decimas et oblationes, quas a fidelibus accipiunt, pauperum, et hospitum, et peregrinorum esse stipendia, et non quasi suis, sed quasi commendatis uti, de quibus omnibus sciant se rationem posituros in conspectu Dei; et nisi eas fidelitèr pauperibus et his qui præmissi sunt, administrent, damna pessuros. Qualitèr vero dispensari debeant canones sancti instituunt, scilicet, ut quatuor partes inde fiant; una ad fabricam ecclesiæ relevandam; altera pauperibus distribuenda; tertia presbytero cum suis clericis habenda; quarta episcopo reservanda, ut quicquid exinde jufferit, prudenti consilio fiat.*

Concilium

Concilium Romanum sub Johanne Papâ ix. A. D. 904. Binius T. 3. p. 2. f. 13. c. 9. *Ut omnis decimatio ab episcopis vel his qui ab eo substituti sunt præbeatur, nullusque eam ad suam capellam, nisi forte concessione episcopi, conferat. Quod si fecisse contigerit, primum legibus subjaceat humanis; postea excommunicatione populi confectus; ad ultimum ipsa capella, quæ magis contentionem, quam utilitatem aliquam præstat, destruat* (z).

Synodus Augustana A. D. 952. sub Joanne Papâ xii. celebrata, c. 10. Binius T. 3. p. 2. f. 132. *Ut omnis decimatio in potestate episcopi sit, et si neglecta fuerit, quicquid inde emendandum sit coram episcopo ejusve missò corrigatur.*

Concilium Lateranense sub Calixto Papâ ii. A. D. c. 18. Binius T. 3. p. 2. f. 465. *In parochialibus ecclesiis presbyteri per episcopos constituantur, qui eis respondeant de animarum curâ, et de iis quæ ad episcopum pertinent, decimas et ecclesias a laicis non suscipiant absque consensu et voluntate episcoporum, et si aliter præsumptum fuerit canonice ultioni subjaceant.*

Concilia varia sub Alexandro Papâ iii. Binius T. 3. p. 2. f. 534. 537. *Conciliabulum* (a) *Clarendonense, quo sexdecim capitula consuetudinum, ut vocabant, Anglicanarum æquitati et ecclesiasticæ immunitati repugnantia confirmata sunt A. D. 1164. Alexandri Papæ iii.*

Ecclesiæ de feudo domini regis non possunt in perpetuum dari absque assensu et concessione ipsius.—Hoc toleravit Papa.

Nullus qui de rege teneat in capite nec aliquis dominicorum ministrorum ejus, excommunicatur, nec terræ alicujus eorum sub interdictionem prænantur, nisi prius dominus rex, si in terrâ fuerit, conveniatur, vel justitia ejus, si fuerit extra regnum, ut rectum de ipso faciat, et ita ut quod pertineat ad curiam regiam ibidem terminetur, et de eo quod spectabat ad ecclesiasticam curiam ad eundem mittatur, ut terminetur.—Hoc damnavit Papa.

Appendix Concilii Lateranensis tertii Œcumenici sub Alexandro iii. Papa, A. D. 1179 or 1180. Binius T. 3. p. 2. f. 599. pars 13. c. 9. *Statuimus ut monasteria ex suis prædiis nullo modo decimas solvere cogantur. Quia si legitime dandæ sunt, orphanis et peregrinis dandæ*

(z) This and eleven other chapters which are assigned to this council, are, according to the testimony of Baronius, of some other council; but, faith he, *ob venerandam antiquitatem digna sunt meo judicio quæ hu loco edantur et subjiciantur.*

(a) Stolen, clandestine meetings of the church, that is, assemblies not convened by the authority of the pope, were called *Conciliabula*. Concil. Carthag. iv. can. 71. *Conventicula hæreticorum, non Ecclesia, sed Conciliabula appellantur.* Du Fresno Gloss. voc. *Conciliabulum*.

1636. sunt. Indignum est enim ut a clericis exigantur, qui propter eum cujus sunt decimæ, pauperes efficiuntur. Nam si pauperes domini sunt, pauperum hæreditas pauperibus ejus eroganda est illis videlicet, qui propter amorem illius quæ psterant possidere dimittunt, eumque nudi sequentis potestati alterius se submitunt.

Pars 13. c. 16. f. 600. Novum exactionis genus est, ut clerici a clericis frugum vel animalium decimas exigant. Nunquam enim hoc in lege Domini præcipi legimus aut permitti: nec enim a Levitis Levite decimas extorsisse leguntur. Illi profeetò solvere laborum suorum decimas debent, qui a clericis spiritualium ministeriorum labores accipiunt.

Pars 50 et ult. c. 39. f. 648. Noveris ergo quod si de artificis, vel de negotiatione, aut etiam de agriculturâ, quam inter terminos parochiæ, in quâ moratur, exercet, vel hujusmodi aliis decimæ solvantur; æquum est, ut ecclesiæ illi reddantur in quâ ille qui reddit per totum anni circulum missam audit.

C. 40. Quod si laicus aliquis e clericis sive conversis decimas de laboribus suis in tuâ diocesi requisiverit, te eum ab exactione hujusmodi prorsus compellas, et laicos illos qui à colonis tertiam vel quartam partem laborum suorum ante solutionem decimarum recipiunt, decimam de portione suâ secundum quod colonus de parte, quæ illum contingit, exolvere consuevit, absque diminutione aliquâ his quibus debentur facias exhibere.

Pars 28. c. 3. f. 619. Statuimus, ut si super decimis inter vos et aliquam personam ecclesiasticam assensu episcopi vel archiepiscopi sui compositio facta fuerit, rata perpetuis temporibus et inconcussa persistat.

Canones Concilii Lateranensis Generalis sub Innocentio Papâ ii. celebrati. Binius T. 3. p. 2. c. 10. f. 487. Decimas ecclesiarum, quas in usu pietatis concessas esse canonica demonstrat auctoritas, a laicis possideri apostolicâ auctoritate prohibemus. Sive enim ab episcopis, vel regibus, vel quibuscumque personis eas acceperint, nisi ecclesiæ reddiderint, sciant se sacrilegii crimen committere, et periculum æternæ damnationis incurrere. Præcipimus etiam ut laici qui ecclesias tenent, aut eas episcopis restituant, aut excommunicationi subjaceant (b).

[Here

(b) With this argument we must take our leave of Sir Henry Calthorpe; for his manuscripts afford us no further light on the present subject. His Reports end with Tr. 10 Car. inclusive, and he does not appear to have made any special argument after *Hilary Term*, 11 Car. The interval between this last term and his death, which happened the first of *August* 1637, was, probably, for the most part, employed in preparing his very diffuse and laborious reading upon the statute of 21 *Ja.* c. 2. of concealments, which he did not live long enough to deliver.

Sir Henry was a member of the *Middle Temple*, and called to the bar, as he tells us himself, in *Hil.* 12 *Ja.* A. D. 1614, at the age of 27 years, and after upwards of seven years

[Here the argument of Sir Henry Calthorpe breaks off; the resolution of the court we have from Sir William Jones, who tells us, that the whole court, (absente Brumpton) after several arguments at the bar, held

years standing. He must therefore have been born in the year 1537, and could not have been more than in the 50th or 51st year of his age at the time of his death. He came early into full practice. He was chosen recorder of London, upon the death of *Mason*, in January 1635, and sat as recorder at the gaol-delivery in that month; but in three weeks afterwards he was knighted and removed, and made attorney of the court of wards and liveries, the first day of Hilary Term. [Sir W. Jones 375. *Cro. Car.* 432.] He was that same year appointed solicitor to the queen; and called to the bench of the Middle Temple; and had chambers assigned to him. [Lib. Parl. Soc. Med. Templ.]

In the second volume of his Reports, Sir Henry mentions the death of his father, and thence takes occasion to give a short account of his family. The passage, though it has some quaintness in it, yet breathes so much filial piety, and shews a mind so deeply impressed with a sense of religion, that the reader, I trust, will not be displeased with the introduction of it in this place. "This same term (*Tr.* 13 *Ja.*) on the 15th day of June, about eight o'clock in the morning, my very worthy and honoured father, Sir James Calthorpe Knt. who had been sheriff of the county of Norfolk the preceding year, and who was justice of the peace and quorum, and captain over certain hundreds in Norfolk, commended his soul into the hands of God, with whom I doubt not but that it still remains: for *qualis vita, finis ita*; and as he lived as a good man, so he died as a good man; and I may safely say of him, *quod pater obiit, sed pietas vivit*: and therefore firmly believing that he is only *præmissus*, not *amissus*, I leave him with the Creator and Redeemer of him and of all, who believe, with whom, I doubt not, but I shall hereafter see him, if I follow his steps; which God grant that I may do. He left behind him five sons and five daughters. Christopher Calthorpe, his eldest son, was married to Maud, one of the daughters and co-heiresses of John Thurton late of Brome, but now dead, by whom he has eight children now alive, and may have more, if it please God. The second son is myself, Henry Calthorpe. God give me grace to follow my profession in the fear of him, that I may not regard my own private lucre more than the safety of my soul, and the peace of a good conscience. The third son is Philip Calthorpe, married to Elizabeth Wade, the daughter and heiress of Wade, of in the county of Suffolk. The fourth son is Francis Calthorpe, who is now beyond sea. The fifth son is Nathaniel Calthorpe, who is now at Cambridge, and a scholar of Trinity College. The eldest daughter was Eleanor Calthorpe, married to Thos. Cotton Esq. the son of Bartholomew Cotton of Stanton Esq. who had issue seven children, four of whom are now alive, namely three sons and one daughter. The second daughter is Mary Calthorpe, who was married to Hammond Ward, of Clintgate in the county of Norfolk, Gentleman, who had issue ten children, eight of whom are now living, namely, seven sons and one daughter. The third daughter is Anne Calthorpe, who was married to Sir Wm. De Grey Knt. of Merton in the county of Norfolk, and had issue ten children, eight of whom are now living, namely, two sons and six daughters. The fourth daughter is Jane Calthorpe, who was married, first, to Sir Edmund Thimblethorpe, of Worstead in the county of Norfolk, Knt. by whom she had issue one daughter, and was afterwards married to Sir Edward Peyton, of Bradley in the county of Suffolk, Knt. who was son and heir of Sir John Peyton, of Ascham in the county of Cambridge, Knight and Baronet, by whom she had issue one daughter. My father left also my mother living, who was the daughter of Bacon, of in the county of Suffolk, Esq. He had likewise two sisters, Mary Calthorpe, married

1636. held that this suggestion was not good. They agreed, that the king may prescribe in non decimando, because he is persona mixta; and that the council of Lateran does not bind him, unless he voluntarily submits to it.

"to one Mr. Goldwell, who died about a year before him; and Jane Calthorpe, who was married to Christopher Bell, the second son of Sir Bell, a Baron of the Exchequer."

It appears from *Parkin's Continuation of Blome's History of Norfolk*, vol. 5. p. 792. that by an inquisition taken at *Norwich*, September 14th, 1637, our Reporter, Sir Henry Calthorpe, was found to die seised of the manors of *Cockthorpe*, *Alby*, *Blakeney*, *Wyveton*, *Acte*, &c. in the county of *Norfolk*, and the manor of *Ampton* in *Suffolk*, on the first of August in that year, leaving by *Dorothy*, daughter and co-heir of *Edward Humfrey* Gent. James his son and heir, aged eleven years. This son James, we find, was afterwards married to *Reynolds*, daughter of *Reynolds*, and sister of Sir *John Reynolds* of *Hampshire*. He is said to have been knighted by *Oliver Cromwell*. He had three sons, James, Christopher, and Reynolds: James, the eldest, was lord of the manor of *Cockthorpe* in 1698, and one of the same name presented one *Henry Calthorpe* to the church of *Cockthorpe* 1743. The male line of *Christopher*, the eldest brother of Sir *Henry*, became extinct in Nov. 1720; and the estate passed through females into the family of Sir *Henry L'Esrange* of *Hunstanton*, Knt.

It must be admitted, I think, from the specimens which have been given in the course of this work, that Sir *Henry Calthorpe*, as a Reporter, has considerable merit. His narrative is easy, and his manner unaffected. He states the facts of every case fully and particularly; delivers the arguments in an even tenour, and rarely suffers their progress to be interrupted by colloquial digression; a too common practice with some of his contemporaries. Although his care in examining, digesting, and arranging the matter is constantly observable, yet the freedom of oral delivery is never lost. The labour that is bestowed upon it never affects the naturalness of the story; we see what passed upon the occasion, represented, as it should seem, much as it passed, but purged of those impurities and incorrectnesses which mingle with hasty and inconsiderate relation. The points that were resolved by the court are carefully and distinctly stated, at the same time that the incidental observations which fell from the different judges are not withheld from our view. It seems to have been the Reporter's anxious wish to make each case complete within itself; that it might be understood without any extraneous help, and read without the interruption of reference. He therefore does not barely mention the cases and books that are adduced in support of the argument, but shows the point of the authority, and extracts the passages; nor does he decline the trouble of transcribing at length the clauses of a statute. The method of condensing the matter of several arguments, of throwing together into one mass what is advanced by different speakers upon the same side of the question, and so presenting the whole under one view; was, probably, little known in Sir *Henry Calthorpe's* time; it was too artificial for the simplicity of those days: but, though we read the arguments of the different counsel separately, and of course occasionally meet with the same topics, yet we have seldom to complain of an irksome repetition: the recurrency of the same topics is not always tautology: though an argument may be substantially the same, yet its effect will vary with the light in which it is placed, and the incidents which accompany it. Upon the whole, we cannot withhold from Sir *Henry Calthorpe* the praise of diligence, accuracy, and perspicuity; nor can we deny, but that his reports and arguments, edited under the care of so able an expositor and so profound a lawyer as their present possessor, Mr. *Hargrave*, would be a most valuable addition to our juridical collections.

But

But they said, that this was a personal privilege which non egreditur personam, and the grantee shall not have advantage of it; and that there was no difference between this case and that of Sydown and Holmes. Whereupon a consultation was granted; and Brampton afterwards agreed to it.]

1636.

Hil. 14 Car. A. D. 1639. B. R.

Gibbs v. Wybourne. [Sir W. Jones 416.]

A MAN had a nursery for young plants, which he used to transplant, and to give or sell to others, who planted them *de novo* out of the parish in their own ground; and the parson of the parish where the land lay in which they were first planted, libelled in the ecclesiastical court for the tithe of the value of the plants so transplanted. A prohibition was granted; the plaintiff declared in it; a plea was put in; the plaintiff replied, and to the replication there was a demurrer, which was argued by *Maynard* for the defendant, and *Rolle* for the plaintiff. The only point was, whether tithes should be paid in this case. *Per totam curiam*, they ought to be paid; and thereupon a consultation was awarded.

Tithes are due of the value of plants sold out of a nursery to be planted in land out of the parish. Cro. Car. 526. S. C.

M. 15 Car. A. D. 1639. B. R.

Barfoot v. Norton. [Sir W. Jones 447.]

IN a prohibition between *Barfoot v. Norton*, it was resolved *per totam curiam*, that tithes are to be paid for honey.

Tithes payable for honey. Cro. Car. 559.

S. C. F. N. B. 51. G.—Croke says, that a consultation was awarded *nisi causa, &c.* It should seem from Cro. Car. 404. that tithes are not payable of the bees themselves.

M. 24 Car. A. D. 1648. B. R.

Banister v. Wright. [Style 137.]

IN a trial at bar between *Banister* and *Wright*, in an action upon the statute of 2 & 3 E. 6. for not setting forth tithes, it was said by the court, that tithes, which lie not within any parish, are due to the king, and that lands must be parcel of a parish, either by prescription, or by act of parliament; and that lands lying within a forest, and in the hands of the king, do not pay tithes, although they be within a parish: but, if the lands be disafforested,

1648.

and be within a parish, they ought to pay tithes ; for their not paying tithes, being in the king's hands, is but an immunity for that time only.

Hil. 6 & 7 Car. II. A. D. 1655. Scac.

Guilbert v. Everfly. [Hardr. 35.]

Tithes payable for herbage eaten by the mouths of travellers horses.

THE plaintiff preferred an *English* bill in the exchequer chamber, for tithes of herbage, as vicar of *Ealing* in *Surry*, against an innkeeper who depastured travelling horses, for which there was no customary payment ; and the value of the lands depastured were proved to be thirty pounds a year. The court were in doubt what decree to make for a certain rate to the parson, it not being ascertained by custom ; and they conceived, that they ought to have regard to the value of the land, which is proved to be thirty pounds a year, and so to allow him two shillings in the pound. But, they agreed clearly, that tithes were payable for such herbage eaten by the mouths of travellers horses, as aforesaid ; and they held that tithes shall be paid for agistment of cattle by the occupier of the lands : but they said, they would award a commission to inquire into the value of these tithes, *unless the parties agreed in the mean time*, which they advised.

Tithe for agistment of cattle payable by the occupier of the land.

P. 9 Car. II. A. D. 1657. Scac.

Stavely v. Ullithorn. [Hardr. 101.]

The council of *Lateran*, a general law received in *England* ; and lands discharged of tithes by that council are discharged by law, as all lands belonging to the *Cistercian* order were.
Wood's Exchequer Decr. vol. 1. 24 S. C.

IN an action upon the case in a feigned action, upon a bill in equity, and an order for a trial at law, the question was, whether certain lands were discharged of tithes, as having belonged to the abbey of *Fountaines* in *Yorkshire*, which was of the *Cistercian* order ; and it was held, *by the court* clearly, that the council of *Lateran*, which freed that order from payment of tithes, was a general law received in *England* ; and if these lands were discharged of tithes, from the time of that council, that no other covenant or contract made by the abbot to pay tithes, could dispense with this privilege, or make them liable to tithes ; for once discharged by that council, always discharged ; for the council is as forcible as an act of parliament, which concludes all parties,

And

And the court was also of opinion, that if there were any such agreement for payment of tithes, before the council, that yet this council, as a general law, which includes all men's consent, had dissolved it, and the lands were discharged.

1657.

P. 9 Car. II. A. D. 1657. Scac.

Sheffield v. Serjeant. [Hardr. 102.]

UPON a bill in equity, to be relieved for customary tithes in *London*, the case was, that the plaintiff's title was under a sequestration by parliament, and an order thereupon by the committee for plundered ministers; and the question was, whether he was relievable according to the decree confirmed by statute 37 H. 8. chap. 12. concerning tithes in *London*, by which the mayor of *London* must be first addressed to; and the decree mentions only the parson, vicar, and curate; and whether, he that is in by sequestration be within it, not being parson *de jure*, was the question. And it was urged by the defendant's counsel, that he is relievable there, and therefore not here, because he comes in under the parson's title, and as his lessee. The same law is of an impropriator, who is not within the words of the decree; and that so it was lately ruled in *Chancery*, which the court agreed to, but yet were divided in this case; and it was afterwards, by consent, referred to compromise.

The court was divided in opinion, whether he that is in by sequestration, be relievable for customary tithes in *London*, according to the decree confirmed by the statute of 37 H. 8. chap. 12.

M. 9 Car. II. A. D. 1657.

Sheffield, clerk, v. *Pierce* and others. [Decree Book, 12th Nov.]

THE bill stated, that by the judgement of the late parliament of *England*, assembled at *Westminster*, on the 3d of *November* 1640, the rectory of *St. Swithin's*, in *London*, stood sequestered from *Richard Owen* to the use of *A. Menlius*, an orthodox divine; and that, he relinquishing the same in the year 1647, it was, by the same parliament, in the same year, afterwards ordered, that the same rectory should thenceforth stand sequestered to the use of the plaintiff, and that he should officiate the same, and have to his use the parsonage-house, glebe-lands, and all the tithes, rents, duties, and profits whatsoever of the said rectory to his own use, till further order should be taken in the premises; that by virtue of the said order of parliament he entered, and officiated in the cure, and

Plea of the statute 37 H. 8. c. 12. f. 19. respecting tithes in the city of *London*, to a bill in equity for the tithes of the parish of *St. Swithin's*, over-ruled.

1657.

performed his duty therein in all things, and ought to have had the tithes, offerings, profits, and commodities, of what kind soever, belonging to the same as rector and parson there, as the former ones had heretofore had and received and enjoyed the same. The bill then set forth the statute and the decree, confirmed by act of parliament in the 37th year of *H. 8.* touching the payments of tithes by the citizens of *London* after the rates of every 10 s. a year rent 1 s. 4½ d. and for every 20 s. the sum of 2 s. 9 d. and so on; and that the greatest part of his parishioners have and still do continue payment of all kind of tithes, offerings, duties, and profits to the plaintiff, or some recompence for the same; but the defendants have for five years refused the payment of the same. The plaintiff therefore prayed, that the defendants may make a full discovery of the messuages, &c. they held for the same years, and the yearly rent, and that the tithes and duties due for the same may be decreed to him accordingly.

The defendants put in a plea and demurrer, setting forth, that the plaintiff entitles himself to the tithes in question by an order of the late parliament begun and held at *Westminster* in 1640, but makes his title by act of parliament made in the 37th year of *H. 8.* and of a decree made thereupon; and that it was doubtful whether the plaintiff, coming in by sequestration, be relievable before the mayor of the said city of *London*; and therefore the said defendants for plea say, that the said act of parliament and decree do only provide for the recovery of tithes in *London*; and that in and by the said decree it is decreed, “that if any variance, controversy, or strife, “did or should arise in the said city for any payment of tithes, “then, upon the complaint by the party grieved to the mayor of “the said city, he shall, by advice of counsel, call the parties before him, and make an end of the same; and if he should not “within two months after the complaint, the lord chancellor of “*England*, within three months after complaint made to him, “should make an end of it;” that the said plaintiff ought to have pursued the way directed by the said decree; and that if the plaintiff be not relievable within the said decree by the said lord mayor of *London* and lords commissioners of the great seal of *England*, as he said by his said bill he is, much less could this court take cognizance or jurisdiction of a case of this nature whereby to relieve the said plaintiff.

Upon reading the plea, and hearing counsel on both sides, on the 24th of *November* 1655,

It

It was ordered by the court, that the said plea and demurrer should be over-ruled, and that the said defendants should answer the said bill.

The defendants answered, and denied that they knew that the plaintiff was ordered to officiate the cure of the said parish as rector there and have the profits, or that he had officiated there; and that if he had any title thereto, they did not conceive him to be entitled to 2 s. 9 d. in the pound for his tithes according to the rents they then paid for their houses, it not being the intent of the said statute and decree to pay tithes according to the improved rents, but according to the old rents as they were before the said statute; they confessed that they were inhabitants, and set forth the houses, &c. and the rents they paid for the same; and that when the said plaintiff first came to officiate there, he agreed to accept of 120 l. *per annum* with some of the parishioners in lieu of tithes and duties there, which had been constantly paid to him.

The rate ordered by the statute 37 H. 8. c. 12. s. 2. to be paid on the rent of houses in London in lieu of tithes, is assessable on the improved rents of such houses.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides.

Now, upon full hearing and full debate, and reading the proofs in the cause, and the said order of parliament begun and held at Westminster aforesaid, on the third of November 1640, bearing date the 30th of December 1647, it appeareth to the court, that it was ordered that the said rectory of St. Swithin should thenceforth stand sequestered to the use of the said plaintiff, and he to officiate the same, and to have all the tithes, duties, and profits whatsoever of the said rectory to his own use; and also it appeareth, that the said plaintiff, by virtue of the said order of parliament, did ever since officiate the said cure, and perform his duty therein in all things, and therefore ought to have had the tithes, offerings, profits, and commodities, of what kind soever, belonging to the said rectory, as rector and parson there, as the former ones there therefore had had and received the same; and that the said defendants had not paid the tithes due to the plaintiff for the several years complained of in the bill to be behind and unpaid.

And as for the *composition*, pretended to be made between the said parishioners and the said plaintiff, to accept of 120 l. *per annum* in lieu and satisfaction of all tithes and duties due and payable to him within the said parish, it appeareth to this court, that the said composition was to continue for the space of three years next after the said plaintiff's coming to officiate there, and no longer; and there not being sufficient proof made on the said defendant's behalf that the said

1657.

said sum of 120 l. was paid to the said plaintiff any longer than the said three first years.

The court is therefore fully satisfied, for the reasons before alleged, that the defendants ought to have satisfied and paid their several and respective tithes, due and payable by them, to the said plaintiff for the years aforesaid complained of by the bill, according to the rate of 2 s. 9 d. in the pound for their several houses, barns, warehouses, cellars, and tollars, which they held within the said parish, according to the several yearly rents which they severally and respectively pay for the same: yet nevertheless in regard the said plaintiff, being present in court, did declare himself willing to accept the several sums heretofore paid by the said defendants, and mentioned in the decree for their several houses, &c. for tithes, in full satisfaction of all tithes due and payable to the plaintiff by the said defendants; and that the said defendants shall continue the payment of the same as long as he continues rector thereof, and they continue inhabitants within the said parish; and if any differences arise between the said parties touching the payment of the tithes according to the several rates and proportions in the decree mentioned, it is referred to the auditor of his highness's revenue within the city of London to cast up the same upon view and perusal of the said pleadings, and certify to this court his doings and proceedings therein with all convenient speed; and that upon return of the said certificate the said defendants shall thenceforth satisfy and pay to the said plaintiff all such sums of money as shall be certified by him to be due to the plaintiff. And it is ordered, that the said defendants shall satisfy and pay to the said plaintiff 10 l. for his costs and charges by him sustained in the said cause.

M. 9 Car. II. A.D. 1657. Scac.

Coe, Clerk, v. Mason. [Decree Book, 26th Nov.]

An endowment that the vicar of *Branghinge* in *Hertfordshire* shall wholly receive and fully possess all obventions of the altar, with the tithes, and the

THE plaintiff, as vicar of the parish church of *Branghinge*, exhibited a bill, setting forth, that he, on the first of *June* 1648, by an order of the committee for *plundered ministers* appointed by authority of parliament, was nominated and appointed to officiate the cure of *Branghinge* (being at that time under sequestration for the delinquency of *William Archer* incumbent), and to hold and enjoy the vicarage-house and the glebe-lands, and also to take, receive, and enjoy, all and singular the tithes, benefits, and profits thereof,

thereof, as had been before received by his predecessors ; and that he had fully performed the cure, whereby he was entitled to have and receive all manner of small tithes ; that from time whereof the memory of man is not to the contrary, or otherwise, by some *ancient endowment*, the vicar of the said parish church, for the time being, hath received and taken, and is entitled to take, receive, and enjoy, all and singular the tithes of hay, hops, lamb, wool, and woods, and all and singular the minute and privy tithes yearly from time to time coming and growing, &c. within the said parish and titheable places thereof, which had always been paid in kind ; that the defendant, for divers years past, had been an inhabitant therein, and for two years was occupier or possessor of divers lands, meadow and pasture, parcel of and belonging to the manor of *Brangbury* and the titheable places thereof, and planted hops, and cut down wood, and kept and depastured upon the said grounds sheep, from which he had lambs, and sheared the same, and had wool, and also cut down grafs, and made the same into hay ; the tithes of all which amounted to a large sum ; all which tithes are due to the said plaintiff, and ought to have been paid *in kind*, or some composition made to him for the same ; which the said defendant detained from him, and refused the said tithes. He therefore prayed a discovery of his said tithes, and the values thereof, and an account and satisfaction for the same.

The defendant by his answer said, that it may be true, but that he knew not, that the plaintiff was appointed to officiate the cure of the said parish ; that he believed the plaintiff for eight years past might have officiated the cure there, and have a right to all tithes formerly of right paid to the vicar ; but he denied that time out of mind, or by ancient endowment, the vicar ought to have all tithes of hay, hops, and wood, and all minute tithes. The answer also stated, that for three years past he, the defendant, had inhabited in the said parish, and been farmer of lands there, parcel of the said manor ; and he set forth his tithable matters, and the values thereof, and that he had paid no tithe at all to the plaintiff, conceiving there was none due to him, for that all the lands he occupied were and are *glebe lands* of the said manor, which were parcel of the possessions of the priory and canons of the *Holy Trinity* in *London* ; that the church of *Branghinge* was long since appropriated to the priory and canons, and confirmed to them by the bishop of *London*, being bishop of that diocese ; and that by an endowment made in the year 1218 it appears, that the vicar of *Branghinge*, in the name of the

vicarage-house, and all the land to the said church, except *Valdebery* and the tenements in the possession of the canons of the *Holy Trinity* in *London*," entitles him to all small tithes arising in the parish.

vicarage,

1657. vicarage, "should wholly receive and fully possess all obventions
 " of the altar, with the tithes and the vicarage-house, and all the
 " land to the said church then belonging (except the croft called
 " *Valdebery*, and except the tenants and their tenements which in
 " the portion or dividend of the canons should remain;") that, by
 virtue of the said endowment, the vicar there never could claim to
 have any small tithes of the tenants and occupiers of the said lands
 which the defendant holdeth within the said parish, the same being
 excepted from payment of any minute tithes to the vicar by the
 same endowment, the said lands, and also the minute tithes, being
 the portion or dividend of the said canons; that he never heard
 that any minute tithes, or any tithes at all, were ever paid or given
 to any of the vicars of *Branghinge* for any of the lands in his occu-
 pation; neither doth he conceive, that the said vicar hath any right
 or title to the same, either by prescription, endowment, or other-
 wise; that about thirty years since the owners or occupiers of
Branghingberry, whereof the lands in the defendant's occupation are
 parcel, did, for some years, give to the vicars thereof for the time
 being *five marks* a year by way of gratuity, though the vicars pre-
 tended it an ancient payment in lieu of small tithes; and there-
 fore insisted on his right to refuse to pay tithes.

The plaintiff replied; the defendant rejoined; and witnesses
 were examined on both sides.

Copy of an
 endowment
 read, ex-
 plaining the
 right of the
 vicarage
 tithes.

The cause came on this day ten night; and upon opening the
 pleadings, and reading a copy of an endowment extracted out of
 the principal registry of the late bishop of *London*, dated at *Fulham*,
 in the year 1218, (c) and proved to be a true copy, which seemed

to

(c) The endowment, which I have extracted from the register in the registry of the
 diocese of *London*, is as follows: "*Omnibus sanctæ matris ecclesiæ filiis ad quos præsen-*
scriptum pervenerit Willielmus Dei gratiâ London episcopus salutem in Domino sempiter-
nam. Cum venerabilis in Christo pater Cardinalis tituli sancti Martini presbiter cardi-
nalis apostolicæ sedis legatus auctoritate legationis suæ dilectis in Christo filiis priori
canonicis sanctæ Trinitatis London ecclesiam de Branghing, quæ ratione patronatûs a-
cosdem canonicos pertinebat, ob devotionem et obedientiam, quam in perturbatione regni An-
gliæ sanctæ Romanæ ecclesiæ impenderunt, piâ consideratione contulerit, et cartâ suâ, quam
inspeximus, confirmavit: Nos attendentes eorundem canonicorum conversationis honesta-
tatem, et religionis fervorem, eundem ipsi ecclesiam cum omnibus ad eam pertinentibus
intuitu pietatis concessimus, et episcopuli auctoritate in usus proprios confirmavimus eis
ecclesiæ suæ perpetuâ possidendam. Salvâ perpetuâ victuri presbitero vicario nobis
successoribus nostris ab eisdem canonicis præsentando, et residuum ibidem futuro cu-
socio idoneo capellano. Qui quidem vicarius, nomine vicariæ, omnes obventiones altaris cu-
minutis decimis, et managio, et totâ terrâ ad eandem ecclesiam tunc pertinente (except
croft

to explain the right of the vicarage tithes in question: the court took time to consider of the same; whereupon the barons being attended with copies, the cause came on to be further heard this day; and upon full and deliberate hearing,

And upon long debate of the matters in question, and touching the meaning of the said endowment; and upon reading the several depositions for the plaintiff touching the payment of the tithes in question to the vicar of *Branghinge* for the time being; *Forasmuch* as it appeareth to the court, by the depositions of several witnesses, that the small tithes of hay, hops, wool, and other small tithes, have been paid in kind, or by composition, to the plaintiff, as vicar of *Branghinge*, and to his predecessors vicars there; and for that it is also proved by the plaintiff that the said defendant for the said years had the aforesaid tithes of hops, wood, hay, wool, and lambs, the tithes of all which amounted to 7 l. 4 s. 8 d.; and the court being of opinion, that by the said endowment the said plaintiff is entitled to all the small tithes arising within the said parish; it is thereupon finally ordered, adjudged, and decreed by this court, that the said defendant shall forthwith pay unto the said plaintiff, or to his assigns, the said sum of 7 l. 4 s. 8 d. for the value of the said tithes by him detained from the said plaintiff.

The court's opinion.

M. 9 Car. II. A. D. 1657. Scac.

Hele and others, v. *Pronte*. [Decree Book, 16th Nov.]

THE bill stated that the plaintiffs, ever since the 25th of *March*, in the year 1653, had been lawful owners of the rectory impropriate of *North Peltherwin*, in *Devonshire*, with all tithes and profits thereunto belonging; that, time out of mind, all the tithes of corn and grain growing therein, and the titheable places thereof, had been always paid to the rectors and owners thereof in kind, or a composition for the same; and that the defendant had been

A bill in equity lies to be relieved against the subtraction of predial tithes, notwithstanding the statute 2 & 3 E. 6. c. 13. gives an action at law.

"*crustâ illâ, quæ vocatur Ealleberi, jacente a parte Australi managii prætaxati, et ex-*
"*ceptis tenentibus et eorum tenementis quæ in portione canonicorum remanebunt) integrè*
"*percipiet et plenariè possidebit, et omnia onera episcopalia et archidiaconalia ad ipsam*
"*ecclesiam spectantia consuetu et debita sustinebit. Et ne futuro tempore possit hæc nostra*
"*concessio aut confirmatio occasione quâlibet irritari, hoc scriptum sigilli nostri munimine*
"*duximus roborandum. His testibus, &c. Dat. apud Fulham anno Domini millesimo ducent-*
"*esimo octavo decimo, Sextodecimo cal. Martii pontificatus nostri anno nono. 1657.*" *Fitz-*
Jun. 55. Stokesly, 110.

yearly

1657. yearly owner of 20 acres of arable land within the said rectory, and yearly mowed wheat, barley, oats, and other grain, and carried the same away without setting out the tithe thereof regularly. The bill therefore prayed a discovery of the quantity and the value, and that the defendant might be decreed to pay the same.

The defendant appeared, and put in a *demurrer* and answer.

And for demurrer he set forth, that between the 25th of *March* 1653 and the 25th of *December*, in the said bill mentioned, he was owner of 20 acres of arable land within the said rectory, sown with wheat, barley, oats, and other grain, and yearly mowed the same, and converted the same to his own use, and that the tithes thereof yearly were worth 5 l. but that he is advised that the subtraction of predial tithes by the not setting out of the tithe from the nine parts, and the unequal division thereof, are matters which may be relieved at law upon the statute 2 & 3 *E. 6. c. 13.* and therefore the plaintiffs ought not to prosecute any suit in equity for the same; the said plaintiffs not having set forth any certain title to the tithes, or shewed how long since their estate therein might commence since the subtraction of the said tithes. The defendant also set forth the titheable matters, and denied any fraud in setting out tithes.

The plaintiffs replied to the answer; the defendant rejoined; and witnesses were examined on both sides.

And upon opening the pleadings, and reading the evidence, and upon full debate,

It is ordered by the court, that the defendant shall pay to the plaintiff 7 s. 6 d. proved to be due and detained for tithes complained of by the said bill, and shall at all times hereafter duly tithe and set forth the tithe of corn and grain arising, &c. in the said parish and titheable places thereof by itself, so that the said plaintiffs or their servants may for the future take and carry away the same without any trouble or denial from the said defendant, or any claiming by or under him.

Tr. 10 Car. II. A. D. 1658. Scac.

Langham v. Baker and others, parishioners of St. *Helen's, London.*

[Hardr. 116.]

THE plaintiff, as farmer of the impropriate rectory of the said church, prefers his bill here against the defendants for not paying their tithes in *London*, according to the decree in statute 37 *H. 8. c. 12.* to which the defendants plead the said decree, and that the plaintiff hath his remedy before the mayor of *London*, by the act of parliament, which settles the decree; and demand judgement, whether or no this court will take cognizance of the matter?

An *English* bill lies in the exchequer, for non-payment of tithes in *London*, according to the decree in stat. 37 *H. 8. c. 12.* Hardr. 116. pl. 1.

And it was held clearly, that the court had jurisdiction in this cause; for that it appears by the very decree itself, and the act of 37 *H. 8.* and by *Lindwood de decimis*, that tithes were payable in *London*, before the said act, for houses; but the *quota* was doubtful, which is remedied by the said act and decree; and the act has no negative words; it is not said, "before the mayor of *London*, and not elsewhere." See *Scudamore's* case, cited 2 *Inst.* 659. *Co. Mag. Chart.* upon 2 *E. 6.* and tithes were determinable here *ab antiquo*, as appears by 38 *Aff. Selden de decimis*, 4 *E. 4.* and by *Articuli Cleri*, c. 4. In the case of the king and his farmers, the cause follows the person, and his privilege; and this case is not to be resembled to cases where justices of peace are empowered by act of parliament; and for that cause justices of *oyer and terminer* have nothing to do, nor justices of gaol-delivery; and so *vice versa*, 11 *Rep.* Doctor *Forsler's* case; for they have but a limited jurisdiction; and the king's farmer has, in respect of the revenue, the same personal privilege that the king has; and, without question, the king may sue here; and it was ruled, that the defendants *answer over*.

Tr. 10 Car. II. A. D. 1658. Scac.

Bulton v. Honey. [Hardr. 130.]

IN an *English* bill for vicarage tithes, in some towns in *Kent*, the plaintiff did not set forth in his bill, how they became due to him, whether by prescription or endowment, as he ought to have done; and exception was taken to this at the hearing, after answer and depositions: and the exception over-ruled, because the defendant does

In an *English* bill for vicarage tithes, plaintiff need not set forth how they became due

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to him,
whether by
prescription
or endow-
ment.
Vide *infra*.

does by his answer admit him to be vicar, and that the tithes in question are his due; but insists only upon payment and satisfaction. *Which note:* for it has often been ruled contrary, it being the ground and foundation of the plaintiff's bill: but the bill was afterwards dismissed upon the merits, with 40 s. costs.

Tr. 10 Car. II. A. D. 1658. Scac.

Doble v. Potman. [Hardr. 160.]

In a cross bill, the plaintiffs need not entitle themselves to the jurisdiction of the court.

UPON a cross bill against a parson to discover what sort of tithes in particular he claims to be due to him; for that the parson in his bill one while demanded one manner of tithing, and another time, another; the court held, that in such a cross bill, the plaintiffs need not entitle themselves to the jurisdiction of the court, because the cross bill is grounded upon another bill here in court; as, if a man be sued here in the office of pleas, he may have an *English* bill to be relieved against the plaintiff, without setting forth matter of jurisdiction.

M. 10 Car. II. A. D. 1658. Scac.

Langham v. Sparflove and others, parishioners of St. *Helen's, London.*

[Hardr. 130.]

If a *modus decimandi* be alleged no otherwise than by way of answer to an *English* bill for tithes, the defendants must answer to all other parts of the bill; but, if he pleads it, he need not answer to any other matter.

TO an *English* bill for tithes of certain houses in *London*, according to the act of 37 H. 8. c. 12. and to have a discovery of the improvements of rent; the defendants, in their answers, set forth a customary payment in lieu of all tithes; and exception was taken to their answers, because they did not discover their rents(*d*), but relied upon their answer *de modo decimandi*. And the court held, that the *modus* being alleged no otherwise than by way of answer, they ought likewise to have set forth the particulars of their rents, and answered to all parts of the bill; but, if the defendants had pleaded it, they need not have answered to any other

(*d*) The answer, as stated in the decree-book, was in this respect as follows: "And all the said defendants did severally and respectively set forth by their said answers the particular rents of their houses, which they alleged to have been their ancient rents." An issue on the custom was directed to be tried at bar by a jury of the county of *Kent*, but the event of that trial I have not been able to discover.

matter. And so it was ruled, though objected, that if the proofs were against them upon the *modus*, they might then answer upon interrogatories, to the particulars.

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Vide infra,
Gumley v.
Birt, contra,
as to this
point.

M. 12 Car. II. A. D. 1660. Scac.

Phillips v. Kettle. [Hardr. 173.]

IN debt upon the statute of 2 & 3 E. 6. the plaintiff declared, that he was rector of *St. Martin's All Saints*, and that by reason thereof he ought to have the tithes of 100 acres of land in the said parish of *St. Martin's All Saints*, and the tithes of 80 acres of land in the parish of *St. Martin's Genavefee*, without shewing how he became entitled to the lands out of his parish. This was holden by the court to be well enough after verdict: besides that, a general allegation without shewing a title, is well enough in this action.

In a declaration on the statute of 2 & 3 E. 6. the plaintiff need not shew how entitled, though he claims tithes of lands in another parish.

P. 13 Car. II. A. D. 1661. Scac.

Cage v. Warner and another. [Hardr. 182.]

THE bill charged, that the plaintiff in the month of *May* 1658, became incumbent of the church of *Bearssted* in *Kent*; and that the defendants in *June* 1658 and 1659, by colour of an order of sequestration, made by the committee, in the county of *Southampton*, as they pretended, had seized divers tithes of divers parishioners, within the plaintiff's parish, due to the plaintiff; and to discover the particulars of the tithes so taken, and their values, and to have them paid to the plaintiff, was the scope of the bill; to which the defendant demurred, because it is a matter determinable at law, and a criminal matter; but the court put the defendants to their answer, *because it is matter of discovery*.

Defendants must answer an incumbent's bill for discovery of tithes illegally seized, with all the particulars and values.

H. 14 & 15 Car. II. A. D. 1662. Scac.

Page's Case. [Hardr. 322.]

IN a bill for tithes, the defendant, by his answer set forth, that the lands whereof tithes were demanded, were parcel of the priory of _____ and that the lands belonging to that priory were discharged by order, without saying more, and this was held sufficient: *which note*, because of the uncertainty,

Defendant set forth in his answer, that the lands where tithes were demanded, were parcel of a priory,

which was discharged by order, without more, and held good.

H. 14 & 15 Car. II. A. D. 1662. Scac.

Stone v. Ludlowe and others. [Hardr. 321.]

Though complainant did not shew how he was entitled to the tithes, yet held good; but *quære*.

IN a bill for tithes due to the complainant, as vicar and incumbent of in *Essex*, the complainant did not shew how he was entitled to them, *viz.* by prescription, endowment, or otherwise; and the court held it to be good notwithstanding. *Which note*, for it is against many precedents in this court, which I have known of demurrers for that cause held to be good.

M. 14 Car. II. A. D. 1662. Scac.

Campost v. — [Hardr. 315.]

IN an action of debt on the 2 & 3 E. 6. for tithes of *Etham Park* in *Kent*, the general issue was pleaded, and upon a trial at bar it was holden upon evidence by *Hale, C. B.* and the whole court, that the king is not by virtue of his prerogative discharged of tithes for the ancient demesnes of the crown; but, that he is capable of a discharge *de non decimando* by prescription, because he is *persona mixta*, as well as a bishop. *Vide 2 Rep. Bishop of Winchester's case.* But, if the king alien any of the lands which he is so discharged of tithes for, his patentee shall pay tithes; and not only so, but the prescription is destroyed for ever, though the same lands should afterwards come into the king's hands again, by escheat or otherwise.

Tr. 15 Car. II. A. D. 1663. Scac.

Twiss v. Brazen Nose college in Oxford, Blunt, and others.

[Hardr. 328.]

Vicar who hath, time out of mind, or for a long time, used to take tithes or other profits, shall not be concluded by the tithes not being expressed in the endowment of the vicarage.

IN a bill at the suit of the vicar of *Gillingham*, in *Kent*, for tithes of the manor of *Uxbury*, and other lands belonging to the rectory impropriate of *Gillingham* aforesaid; the tithes demanded were for eight years last past, and ending in the year of our Lord 1661.

The case upon the hearing appeared to be, that for divers years before the bill exhibited, in the times of many vicars, the said tithes had been enjoyed by the said vicars of *Gillingham* aforesaid; but an endowment was produced bearing date the 7th day of *March*, in the year 1362, mentioned to have been made by *Islip*, then archbishop

bishop of *Canterbury*, and preserved in the archbishop's register; by which it did not appear, that the vicar was endowed with any tithes of corn or grain; nor in the said instrument was liberty reserved to the archbishop, as is usual in such cases, to augment or diminish, &c. and it was thereupon insisted, that the vicar ought not to have those tithes.

But the court held, "that where a vicar has used time out of mind, or for a long time, to take tithes or other profits, he shall not be concluded by their not being expressed in the endowment of the vicarage," and that it had been often so held and ruled; and it shall be presumed, by reason of a long possession of such tithes, &c. that the vicarage has, at some time or other, been augmented therewith; and the not reserving such a power to the archbishop is not material; for an augmentation may have been notwithstanding, with the assent of, or upon citing, all parties; but not without notice or citation; as it may be, when such a power, as aforesaid, is reserved to the archbishop (e).

M. 16 Car. II. A. D. 1664. Scac.

Grant v. Hedding and Ball. [Hardr. 380.]

IN a bill in equity for the tithes of a nursery sold; upon the hearing of the cause divers doubts and questions were made: as,

Of tithes due and payable for a nursery, trees, fruit, and for corn.

First, Whether tithes should be paid, if the trees yielded no other fruit?

Secondly, Whether tithes should be paid for those trees, that yield fruit, which pay tithes?

Thirdly, If some yield fruit and others not, whether or no, those that yield fruit, privilege and exempt the others that yield none, when they are all sold together?

Fourthly, Whether tithes shall be paid for them, when they are sold and transplanted within the same parish?

Fifthly, Whether the vendor or vendee shall pay the tithe?

(-) The decree-book states, that "the court, although fully satisfied by the proofs, with the plaintiff's right and title to the said tithes of corn and grain, as vicar of *Gillingham*, did notwithstanding think fit, before they proceeded to decree the said cause, to give the defendants time to consider whether they would desire a trial at law, touching the said tithes and the said plaintiff's right and title thereunto, which trial was to be at law." Time was accordingly given, but the defendants not appearing by counsel at the day appointed, a decree was made in favour of the plaintiff.

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And the court was of opinion, that if the owner sells them and pulls them up himself, he shall pay the tithes ; but if he sells them particularly to another, the vendee shall pay the tithes ; as in case of tithes of corn, if corn be standing, the vendee shall pay the tithes ; but if it be sold after severance, the vendor must. *And adjourned.*

But afterwards, tithes were decreed in all such cases.

M. 16 Car. II. A. D. 1664. Scac.

Ingleby v. Wyvell. [Hardr. 381.]

IN trover and conversion for a lamb and a sheaf of wheat, upon not guilty pleaded a special verdict was found to this effect : viz. that the abbey of *Fountains* had been time out of mind of the order of *Cisterciens*, which order was exempted from payment of tithes of their lands, *quas propriis manibus excolerent* : that before the council of *Lateran* this abbey was seised of the territory and grange of *Stenningforth* within the prebend of *Studley* and the parish of *Rippon* : that betwixt the years 1216 & 1261 there was a composition between the abbot and convent and the prebendary of the said prebend under their common seals, that the abbot and convent should be for ever free from payment of any tithes of their lands which they tilled at their own charge in *Stenningforth*, and belonging to their grange of *Galgach* within the territory of *Winkelesley*, A. D. 1216, and that they should pay tithes for all other lands there and elsewhere out of the said grange of *Stenningforth* : and that the said abbot and convent should pay annually to the said prebendary and his successors the sum of five marks by equal portions, the one moiety to be paid at *Easter*, and the other moiety at *Michaelmas*. It was further found, that upon the 12th of *November*, A. D. 1359, there was another composition made between them under the seal of the convent and the prebendary, reciting the former composition, (but it was not found that it was confirmed by the patron and ordinary), and by this latter composition, the prebendary and his successors for all time to come were to have their election yearly, either to receive tithes in kind of corn and grain arising within the places aforesaid, as well of lands in the hands of the abbot and convent, as in the hands and manurance of their tenants, else to receive five marks to be paid by the said abbot and convent in lieu thereof, so as such election were notified to the abbot, or to any

of the monks resident within five miles of the abbey, or to the porter of the abbey, upon or before the feast of St. Thomas the martyr, in the presence of a proctor or of two good men; and for those years in which the prebendary should choose to receive tithes, the five marks should not be paid, *et contra*; and that when no election was made, the prebendary and his successors should be contented with the said five marks, saving the right of the tithe of lamb and wool, which was to be paid as formerly. It was then found, that the possessions of the abbey came to the crown by 31 H. 8. and that at the time of the trover, &c. the defendants were proprietors of the lands in *Stenningforth*, and that the plaintiff was seised in fee of the prebend, and that a lamb and sheaf were then renovant upon the lands. And whether or no tithes in kind should be paid for these lands, was the question.

Sir Francis Goodrick pro quer. First, he considered, that the last composition was good, though not confirmed, because it was for the melioration of the church, and gave them a benefit, which they had not by the first. And the rule is, that a parson, prebendary, or other sole ecclesiastical corporation, *poteſt meliorare, ſed non pejorare conditionem et ſtatum eccleſiæ.* *Vid. Bro. Corporat.* 68. 2 *Inſt.* 343. 1 *Cro.* 252. And if a confirmation in this caſe were requiſite and neceſſary, it ſhall be intended there was one. *Ex diuturnitate temporis omnia præſumuntur ſolemniter eſſe acta.*

2dly. He conſidered, whether this privilege to be diſcharged of tithes be ſuch a perſonal privilege as that it cannot be releaſed. And he conceived, it might be releaſed and waived; for that *quilibet poteſt renunciare juri pro ſe introducto.* 2 *Inſt.* 252. *Dy.* 249. *Dr. Goodman's caſe.* Alſo, here, the corporation being extinct, the privilege is gone, and the tithes are revived, as *Bro. Corporat.* 78. *Godſb. Rep.* 4. *Hob.* 40. 42. 44. *Andrew and Cooper's caſe,* 3 *Cro.* 675. 2 *Inſt.* 491. 2 *Leon.* 71. But the king's farmer ſhall enjoy the privilege, becauſe it does not conſiſt with the king's dignity to occupy lands himſelf. *Vid. Poph.* 158.

Object. *The Biſhop of Wincheſter's caſe,* 2 *Rep.* and *Inglefield's caſe,* 7 *Rep.* concerning perſonal privileges not transferable.

Reſp. An appropriation cannot be granted over, and yet it may be diſappropriated by a preſentation. 2 *E.* 3. 8. *N. B.* 35. *Hob.* 152. 3 *Cro.* 176. and ſo he concluded for the plaintiff.

—*Pro defendente.* Firſt, the firſt compoſition here is well rooted and ſettled, and is in the nature of an exchange, as appears 2 *Rep.* 45. 2 *Inſt.* 490. *Hob.* 42. Secondly, it ſeems not to be deſtroyed by

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the second. For the second is only by way of collateral agreement, and sounds in covenant : there are no words in it of grant or release. And it cannot here be deemed an eligible inheritance, because it does not pass from both parties. And by a release of five marks, the whole would be discharged, so that it is not reciprocal. 44 E. 3. 5. Also, the corporation being dissolved, the second composition falls of itself. And it shall not be presumed, that this composition was confirmed, unless it be shewn ; because the former, which is more ancient, was confirmed. So he concluded for the defendant.

Hale Chief Baron. By the first composition the abbot only is discharged *quamdiu propriis manibus, &c.* but by the latter the abbot and his tenants are discharged of tithes of corn and hay only ; so that there is a great difference between these two compositions. But he conceived, 1st, that the first composition was good, although the abbot were discharged by his order *quamdiu, &c.* 2dly, that the abbot may well renounce the benefit of his privilege : 3dly, that there may well be a relinquishment of the former composition, and that it may be released or discharged. But the doubt in this case is, whether or no the second composition be good in law without a confirmation, and an annual election according to the composition ; and who must make this election, and how, now that the prebend is dissolved, and by whom, and to whom the notice must be given. There was one *Southwell's case* in 44 Eliz. where an abbot had had a certain quantity of wood to be taken yearly in such a wood, or else a sum of money yearly at his election ; and it was holden in that case, that the election was transferred to the king by the statute of dissolution of monasteries, and that it should go along with the land to the king's patentee. But here this prebend came to the king by the statute of 1 E. 6. of *Chantries, &c.* and whether the election in this case remains or not, may be a question.

Afterward, in *Trin. Term, anno 17 Car. 2.* it was argued again by serjeant *Hardres* for the plaintiff.

First, There had been a question stirred, but not much insisted on by the defendant, *viz.* whether or no this privilege of the abbey to be free from the payment of tithes, may be waived or not. I shall not dwell upon that, for I take it to be very clear, that it may be waived. 1st. Because it was but a particular indulgence granted to the order of Cisterians, and for their benefit and advantage, and therefore it may be waived by them, in like manner as an exemption from serving upon juries, &c. may be waived at one time, and resumed at another ; as is very usual and frequent.

Secondly,

Secondly, It is a rule in law, that whatsoever is created may by some means or other be dissolved and extinguished, though some things cannot be granted over: as in *Lampet's case*, 10 *Rep.* a possibility of a term, though not grantable over, yet may be released to the tenant in possession. *Hob.* 307. an appropriation, though not grantable over, yet may become disappropriate by a presentment. *N. B.* 35. 8 *H.* 7. 12. 21 *E.* 4. 58 *b.* a corody incertain in an abbey, though not grantable over by the founder, yet may be released and extinguished by him. So here.

But the second and more difficult point is this, *viz.* whether this second composition be good or no, because not confirmed by the patron and ordinary. And I conceive that it is good notwithstanding, as our case is, and that for these reasons.

First, The second composition is wholly for the benefit of the prebendary and his successors, and is an enlargement of the former, because by this second composition he has an election, to take either his five marks, or his tithes in kind, whether he will; whereas, by the first composition, he is tied up to his five marks: and in such cases successors are bound, though without confirmation. 44 *E.* 3. 21, 22. in *Osavian Lombard's case*, tenant in tail charged the land with a rent-charge for a release of the right of a stranger: and held, that this shall bind the issue in tail, notwithstanding the statute of *Westm.* 2. 48 *E.* 3. 11 *b.* the like of a recovery in value by the tenant in tail; because the issue is at no loss by it. *Perk.* 17. Tenant in tail may determine his election as to so many acres, or a rent-charge, and the issue shall be bound by it. So here, no loss, but a profit accrues to the succeeding prebendary: and it is a rule in law, *Co. Litt.* 102 *b.* 341 *a.* *Mag. Cart.* 3 *a.* that a parson without his patron and ordinary may *meliorare statum ecclesiæ suæ*. And so in our case.

Secondly, The second composition was made only for a further explanation of the former, and by way of superoneration, and is a surcharge upon the abbot and his successors without any diminution to the prebend: and in that case a confirmation is not requisite. If there be a composition confirmed betwixt a parson and his parishioner, by which the parishioner is to pay 5 *l.* in lieu of his tithes for ten years; and afterwards another composition be made, whereby the parishioner agrees to pay 6 *l.* for those ten years; this second is good without a confirmation, because it is an enlargement of the former, and more for the parson's advantage than that was.

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Thirdly, The same may be proved by the parallel betwixt the parson of a church and an infant: for our authorities resemble these two to one another; as appears *Co. Litt.* 341 a. *Mag. Cart.* 3 a. *Ecclesia infra ætatem existit, et fungitur vice minoris.* Now *Co. Litt.* 337. *Minor statum suum meliorare potest, non deteriorare.* And, therefore, if an infant submit to an award, which is made for his advantage, he shall be bound by it. 13 *H.* 4. 12. 10 *H.* 6. 10. So, if an infant makes partition, or assigns dower, if it be equal and just, he shall be bound by it. The like of a parson.

A third thing is this, *viz.* admitting that the second composition is good, whether or no it be now possible for it to be performed, because no election can now be made in form as directed by the composition, because now the abbey is dissolved, and the corporation extinguished; and the prebend also, with all its possessions, is given to the crown; the one by 31 *H.* 8. the other by 1 *E.* 6. And yet I conceive all this is no hindrance, but that tithes in kind may be recovered.

First, As for the dissolution of the abbey and extinguishment of the corporation, that will create no impediment, because it comes by the act of the corporation itself (to wit) by their surrender; for the act of 31 *H.* 8. vests nothing in the king, but what the abbies themselves surrendered since the 27 *H.* 8. as appears by the statute; and it is a rule in law, that *res inter alios acta alteri nocere non debet, sed prodesse potest.* If a lessee for years charge his estate with a rent, and then surrender, yet the charge continues as long as the term would have lasted, if it had been suffered to run out in time. 5 *H.* 5. 10. Secondly, As for the accession of the prebend to the crown by the statute of 1 *E.* 6. it is there enacted, that all tithes and hereditaments appertaining to any hospital given to the king, shall be in him in as ample manner as in the hospital, and as if they had been particularly named: and it is also enacted, that the king shall enjoy all profits, commodities, &c. appertaining to any hospital by any assurance, composition, or otherwise. So that all is preserved for, and reserved to, the king, that did appertain to any hospital. And unity of possession in the king, of the abbey and the prebend, breaks no squares: for tithes, and a composition for tithes, are collateral to the land, and revive by severance, as appears in 11 *Rep. Harpur's case*: and where there can be no election, there, the party that is to have the benefit of it, shall have and enjoy the thing for which the recompence is given, without any election. *Southwell and Ward's case, M.*

33 & 34 Eliz. Rot. 229. per Popham, Fenner, and Clinch, in manuscript, and printed in Popham's Rep. 91. and adjudged 36 & 37 Eliz.

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The prior of St. Faith's, 13 E. 4. made a grant of 200 faggots or focals to the hospital of St. Giles's in Norwich, or of 20 s. in lieu of them, at the election of the hospital, with a clause of distress, reasonable notice of the election being given; and the hospital covenanted to give notice in the church belonging to the hospital. Afterwards the hospital came to the crown, per 1 E. 6. who granted over the hospital with the said rent, and the grantee distrained for the focals. It was there adjudged, 1st, that the focals pass by the grant of the hospital, and the rent of 20 s. though the focals are not expressed in the grant: 2dly, that there needs no election, because the thing granted was the focals, and the 20 s. are but by way of recompence for it, and as an allowance and satisfaction for the same. And a difference was taken, where the election was precedent, and where subsequent to the grant. If a man grants to another a robe, or 20 s. there, the election is precedent to the interest of the grantee: here, it is not so. *Vide 2 Rep. Sir Rowland Hayward's case.* Now this case of the prior of St. Faith's resembles our case in all respects: for here is a composition for tithes in kind, or else for 5 marks in lieu; and the hospital there came to the king by 1 E. 6. as ours does here, and yet the election remained. But in our case there is a clause, that when there is no election made, the prebendary shall content himself with the five marks. But to that I answer, that this clause must have a reasonable construction and intendment, viz. that as long as there may be an election made by any reasonable way or means, so long there shall be an election, else only five marks due. But here there can be no election made at all according to the composition, by reason that the abbey is dissolved, and that by their own act; and it is a rule in law, that *impotentia excusat legem; et lex non cogit ad impossibilia.* 42 E. 3. 5. if a man covenants to leave lands in as good plight as he found them, and trees are blown down by tempest, he is excused. 5 Rep. 20. *St. Anthony Maine's case*, a lessor covenants to make a new lease to the lessee upon surrender of the former; if afterwards he grant the reversion to another for term of years, the covenant is broken, though no surrender be made, for that he has disabled himself to take a surrender.

Thirdly, If an election be necessary, the plaintiff has made his election; for he has preferred his bill for tithes, and brought the cause to a hearing; which is the same thing as if he had

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had declared at law ; and that does amount to an election ; as when a man brings a writ of annuity, and counts upon it, 5 *H.* 7. 33. *F. N. B.* 152. or, the bringing of a writ of dower, and counting upon it, 12 *E.* 2. *Dower* 158. and the bringing of an assize amounts to a continual claim, 9 *E.* 2. *Age* 141. So I conclude, that the second composition is a good composition ; that it remains in force for the benefit of the prebendary, and all claiming under him ; and that no election is requisite, *quia vana et inutilis* ; and that if an election must be made, the plaintiff here has made his election : and I prayed judgement for the plaintiff.

Afterwards, the court delivered their opinions, that the second composition did not affect the successors of the prebendary, and therefore that the abbot was not bound by it. The reason seems to be, because, by the first composition, the prebendary and his successors were bound only *quamdiu propriis manibus*, &c. and by the second composition the five marks go in recompence of all, whether in *propriis manibus*, or in the hands of the tenants. But to this it may be answered, that it is still at the successor's election to take the five marks, or tithes in kind, and therefore that he is at no prejudice.

The court likewise held, that the power of election is gone, because it cannot now be made according to the composition : and that, therefore, the first composition should stand *quoad terras in propriis manibus* ; and for the others, that tithes in kind might be taken, as before ; for that the election is destroyed. And judgement was given *pro defendente* (f).

M. 23 Car. II. A. D. 1671. Scac.

Risden, Clerk, v. Crouch. [Decree Book, 26th October.]

Hops are in their nature a small tithe, and therefore a custom to pay 6s. 8d. an acre to the rector, in lieu of the tithe of hops, the vicar being

THE bill stated, that the plaintiff, for four years past, is and hath been vicar of the parish of *Albford*, in the county of *Kent*, and ought to have had and received all manner of tithes and church duties, yearly arising, &c. within the said parish, due to the vicar ; that the defendants for the same time have enjoyed several messuages, lands, and tenements, and several hop-grounds planted with hops, within the said parish, and have picked and carried away the

(f) Note, this action was directed by the court of exchequer upon a bill filed by the plaintiff, as proprietor of the prebend of *Studley*, for an account of the tithes of *Stanningforth*. See 1 *Wood's Decrees* 24. 73.

same,

same, without setting out or rendering the tithe thereof, or any thing in lieu, and had several other tithable matters and things, the tithe whereof ought to have been answered to the plaintiff, but that they refused, saying, that the plaintiff had no right to the tithe of hops.

The defendants admitted their inhabitancy, and set forth the quantities and values of their hops, and then stated, that there is and hath been an ancient custom, time out of mind, in the said parish, that every planter of hops shall pay to *the parson* of the said parish, 6 s. 8 d. for every acre in lieu of the tithe thereof, and that the same of right belongs to *the parson* of the said parish, who hath constantly, according to such custom, received the same.

The court declared, that there can be no such custom for the payment of a *modus*, in lieu of the tithe of hops, to *the parson*, for that hops, being in their nature *small tithes*, do belong to the vicar.

The court therefore ordered, that the defendants shall pay to the plaintiff the values of the tithes of their hops which they had in the years aforesaid, according to the values set forth in their answers, viz. the defendant *Crouch* 7 l. for the two years mentioned in the bill, and the defendant *Lounds*, 20 s. for 1669; the plaintiff being willing to accept thereof accordingly.

Tr. 26 Car. II. A. D. 1674.

Conant, Clerk, v. *Greaves*, Bart. [Decree Book, 6th July.]

THE bill stated, that the plaintiff *Conant* had been lawful rector of *Beeding*, in the county of *Suffex*, for five years past, and was entitled to all the tithes within the said parish that had been accustomed to be paid; that the defendant was owner of certain lands called *the Forest of Saint Leonard's* within the said parish, and ought to pay all the great and small tithes arising therein to the rector, or the best buck and doe yearly, at every season, in lieu of the tithes for the said forest; that the defendant, for five years past, had refused to pay any tithes for the said forest; that the plaintiff *Turnor*, as tenant to the said rector, ought to have the best buck and doe yearly, at every season, paid to him in specie, the same being worth ten pounds *per annum*, in full satisfaction for the tithes arising yearly out of the said forest,

The

1671.

endowed
with the
small tithes,
is bad.
1 Sid. 443.
1 Vent. 61.
2 Keb. 612.
S. C.

1674.

The tithes of a forest cannot be withholden for non-payment of the keeper's fees.

The defendant confessed, that he was owner of *the Forest of Saint Leonard's*; and that before and since the plaintiff was rector of *Beeding*, he had given orders to his keepers or tenants of the said forest that they should kill *the tithe deer* when demanded; and that the reason they had not, for two years past, been paid was, that the plaintiff refused to pay the keeper's fees.

The court ordered, that the defendant should forthwith pay to the plaintiff *Turnor* the several bucks and does in arrear in specie, due and owing, as other bucks and does are usually paid, upon warrants.

And it was further ordered, that the defendant should, for the future, pay and deliver to the plaintiff *Turnor*, the lessee, during the term of his lease, and after the expiration thereof to the rector, a buck and doe yearly of forest deer, in specie, in lieu of the tithes of the said forest, at the respective seasons, for the time to come, as other bucks and does were usually paid and delivered, upon warrants, without costs.

M. 27 Car. II. A. D. 1675. Scac.

Turner, v. Weedon and others. [Decree Book.]

THIS was a bill by the plaintiff, as rector of *Soulderne* in the county of *Oxford*, for an account of all tithes, predial, personal, and mixed.

The defendants plead a *modus* of 4d. for every barren sheep and dry beast; a halfpenny for every sheep sold after *Candlemas*; a third of the wool of all sheep brought in after *Candlemas*; and that no tithe is due for coppice and hedge row wood used in husbandry;

The defendants, *Weedon, Kilby, Lord, Dodwell, and King*, put in their plea and answer; and the defendants *Wells and Smith* their answers; and for plea said, that the plaintiff, by his bill, demands tithe wood for hedge rows and coppice woods; for dry beasts, for the time they were kept and fattened; for barren sheep sold before shearing time; and for the second crop, or aftermath of meadow ground; that, time out of mind, there had been a *rate tithe* for barren sheep and dry beasts kept and sold within the said parish; viz. four-pence, and not above, for every cow kept, fattened, and sold there; one halfpenny for every barren sheep sold after *Candlemas*, and before shearing time; the third of the wool for all sheep brought in after *Candlemas*, and sold before *Candlemas* following; and that no other tithes were due for the same; that for the aftermath of meadow no tithes at all were due, by custom nor otherwise; nor for hedge rows or coppice wood spent or used in the premises to which the same belong; nor for any horses kept and used

used about the same, or for any other use : and they set forth the particulars of their tithes.

Upon arguing this plea it was ordered, that the defendants should answer over, and the benefit of the plea be saved to the bearing.

The defendants thereupon put in a further answer ; the plaintiff replied ; and issue being joined, witnesses were examined ; and the cause came on to be heard the 11th instant.

And upon hearing counsel on both sides, and reading several depositions taken in the cause, and a decree made in a cause the 3d of July, in 15 C. 1. in chancery, whereby it appeared, that the matter had been referred to the then *bishop of Oxford* to examine the best way for the payment of tithes, and whether the rate of 40s. a yard land, formerly decreed at the first inclosure, would be prejudicial to the church, who made his certificate, that he did conceive the payment of tithes in kind was, and would be for the future, a greater benefit to the church than the 40s. *per annum* in lieu of tithes for every yard land could be ; it was ordered, adjudged, and decreed, in the said *court of chancery*, that the said decree, as touching the composition and agreement for payment of tithes should be reversed and made void as against the plaintiff and the church of *Soulderne*, and the plaintiff be left at liberty to take his tithes in kind, any thing in the aforesaid decree to the contrary notwithstanding ; and upon long debate of the matter, for that it was insisted upon by the counsel for the plaintiff, that the custom of one halfpenny a sheep fold before shearing, or after, had already been adjudged an unreasonable custom at common law, in the case of *Weeden v. Harden*, in the late king *Charles's* reign ; the court declared they would further consider thereof.

The cause now came on again ; and on reading several depositions, and hearing counsel on both sides ; and on full debate concerning the customs pretended by the defendants ; the court declared, that the custom of a halfpenny for a sheep was an unreasonable custom.

but the court declared all the said customs to be unreasonable ;

And as to all the other customs (except four-pence for a dry cow, and the tithe of aftermath, or second crop of meadow, for which the court would direct a *trial at law*), they declared all the other customs pretended by the defendants to be unreasonable, and overruled the same.

Whereupon it was this day ordered by the court, that the defendants should pay their tithes in kind to the plaintiff, viz. for coppice wood,

and decreed the tithes of coppice wood, hedge rows, and

1675.

loppings;
sheep un-
shorn, dry
cattle, wool,
milk, lamb,
and calves,
to be paid
in kind.

wood, and for hedge rows, and loppings of trees, when sold or not spent in the house; the tenth of the value of the depasturage of sheep, according to the time of their being kept, sold, and removed unshorn; and likewise for all other dry cattle, fed, kept, or depastured (except beasts of the plough and pail, and dry cows, which was referred to a *trial at law*), to pay according to the value of the herbage: tithe wool to be paid, and tithe milk, at all times in the year; lambs to be tithed when fit to live without the dam; and calves to be paid in kind: and it was referred to the deputy-remembrancer to compute and report the same.

And as to the custom of four-pence for every dry cow fed, and for the aftermath, or second crop of meadow, the same was referred to a trial at law, and the equity reserved till after such trial had.

Tr. 28 Car. II. A. D. 1676. Scac.

Skinner, Clerk, v. Smith. [Decree Book, 8th June.]

Where it appeared that prior to the disparking of a park, a shoulder of every deer killed therein had been paid to the parson in lieu of the tithe of the park, the court held the lands tithable.

THE bill stated, that for six years past, the plaintiff was, and now is the rector of the parish church of *Hartlebury*, in the county of *Worcester*, and, as rector, ought to have all manner of tithes, both great and small, coming, &c. within the said parish.

The defendant confessed the plaintiff's title to the rectory, and tithes, and stated that he had paid the plaintiff all tithes due to him, except the tithes of certain lands, containing eighty odd acres, called *Hartlebury Park*, of which he had been tenant about four years, at 48 l. a year; that he had depastured several cattle upon the said ground, but could not set forth the particular number; that the *bishop of Worcester*, and his predecessors, for time whereof the memory of man is not to the contrary, had holden the said lands freed and discharged from all tithes; that he had two colts and one calf, during the said years, the tithe whereof is four-pence a colt, and one penny in a shilling for a calf, which is ten-pence; that he depastured on the said lands all sorts of young cattle for several strangers, and yearly kept sheep, and sheared some yearly, and had some lambs; and he set forth the value of the tithes; and that for sheep sold before the shearing time, the usual tithe is four-pence a score; and that the full tithes of the said lands were yearly worth about 20 s.

Upon hearing counsel on both sides, and reading several depositions taken on behalf of the plaintiff, whereby it appeared, that
before

before the disparking of the said park, the shoulder of every deer, killed in the said park, was paid to the rector of the said parish, for and in lieu of the tithe of the said park; and upon long debate of the matter,

1676.

It was ordered by the court, that the defendant should forthwith pay to the plaintiff the values of the tithes coming, growing, and renewing within the said park, for the said four years, in the bill mentioned, according to the answer, which, at 20 s. *per annum*, amounted to 41.

M. 29 Car. II. A. D. 1677. In Canc.

Anon. [2 Freem. 27. 2 Ch. Ca. 237.]

A BILL being preferred against a quaker for tithes, who refused to answer upon oath; the defendant was brought, by several orders to the bar; and being indeed a quaker, prayed to answer without oath; and having been brought up three times before; the lord chancellor did admonish him of the peril, that the bill would be taken for true, entirely as it is laid, if he answered not; but defendant saying as before, the chancellor pronounced his decree for the plaintiff, and that the bill be taken *pro confesso*; and he referred the valuation to a master, and to examine what was due; and to be armed with a commission for that purpose.

Bill for small tithes against a quaker, taken *pro confesso*, defendant refusing to answer: and a decree for plaintiff, with reference to a master of the valuation; and a commission to examine witnesses.

And the lord chancellor declared, that this court had a cognizance of matters of tithes, as well as the *exchequer*; and that the plaintiff had *his choice of the court*; though sir John Churchill, not being of counsel, but *amicus curiæ*, said, that this cause for tithes, especially *small tithes*, was not proper for this court, and had not been used.

Chancery has cognizance of tithes as well as the *exchequer*. Sir John Churchill, *amicus curiæ*.

H. 30 Car. II. A. D. 1678.

Dodd, Clerk, v. Ingleton. [Decree Book, 24th Feb.]

THE plaintiff, as vicar of the vicarage and parish church of *Chigwell* in the county of *Essex*, claimed the tithe of milk, and complained, that the defendant, under colour of some words in a decretal order made in this court in a former cause between the now plaintiff

The whole tenth meal's milk of every morning and evening is due for the tithe of milk.

1678. *plaintiff and H. Hudson and others, inhabitants of Chigwell (g), had not sent or carried the same to the plaintiff's house every tenth day, or meal as he ought to have done, according to the custom of the said parish.*

1 Freeman.

329.

Raym. 277.

Rayn. 54.

The defendant denied any custom for carrying tithe milk to the vicar's house.

The court being unanimously of opinion, that the *tenth meal's milk*, and not the *tenth of every meal's milk*, ought to be paid for tithes, it is ordered, by consent of the defendant's counsel, that the defendant, for the future, shall pay to the plaintiff his whole tenth meal's milk of all his cows every evening.

But as there was not any custom within the said parish of *Chigwell* insisted on by either side, for the plaintiff's fetching his tithe milk, or for the defendant's bringing the same either to the church porch, or to the vicarage-house in the said parish of *Chigwell*; and the court being divided in opinion, whether of right the same ought to be fetched by the plaintiff, or carried by the defendant; the cause was ordered to stand over, that the court might further consider and advise thereof in the mean time; and, on the 15th of *May 1679*, it was further ordered again to stand over, and that the court will hear counsel on both sides, as well civilians as others, as to the common law right; and on the 22d of *May 1679*, after hearing the civilians, and counsel on both sides, and upon full debate, it was ordered again to stand over for the opinion of the court.

On the 10th of *November 1679*, the cause came on to be further heard, when it was ordered, adjudged, and decreed by the court, that the defendant, for the future, shall pay to the plaintiff his whole *tenth meal's milk* of all his cows every morning, and his whole *tenth meal's milk* every evening; and for that there is not any custom within the said parish of *Chigwell* insisted upon on either side for the plaintiff's fetching his tithe milk, or for the said defendant bringing the same, either to the church porch, or to the vicarage-house in the said parish of *Chigwell*; and the court being of opinion, that tithe milk is due of *common right*, and that as well for the preservation of the same as for the convenience in collecting the said

(g) In the case of the present plaintiff, *Dodd v. Hudson*, 29th April 1675, 27 Car. 2. the court ordered, "that the defendants shall pay to the plaintiff tithe milk in kind all the year round, the said plaintiff or his tithe-gatherer making a demand of the same at the respective habitations of the said defendants." Book of Decrees and Orders.

milk,

milk, the same ought to be brought to the plaintiff, it is thereupon further ordered, &c. that the defendant, for the future, shall bring or send his tithe milk to the church porch within the said parish of *Chigwell*, as the same shall become due from time to time, that is to say, his, the defendant's, whole tenth meal's milk every tenth morning, and his whole tenth meal's milk every evening, to the end that the plaintiff, or his agent, or servant, in that behalf appointed, may receive the same accordingly without costs.

1678.

This point has been since overruled.

P. 31 Car. II. A. D. 1679. Scac.

Legrofs v. Levemoor. [Dodd's MSS.]

ON a trial at law for tithes of a mill, the plaintiff offered in evidence an ancient book, (produced in this court at the hearing), wherein one of his predecessors had made entries of what he had received for tithes for several years, whilst he was vicar, as well for the mill in question, as for other tithes. But the judge would not suffer it to be read in evidence, whereby the plaintiff was non-suited. A new trial was ordered on payment of costs, and, by the defendant's consent, the book to be read in evidence.

Entries in a predecessor's books evidence for the plaintiff.

H. 31 & 32 Car. II. A. D. 1680. Scac.

Turner v. Smith. [MSS.]

BILL by rector for tithes of coppice-wood and underwood. The defendant insisted it was not tithable, being above 30 years growth, and much of it sold by him for timber.

Stub-oak and ash tithable, unless exempted by custom.

Now forasmuch (in the very words of the court) as it appeared to the court by the proofs that the wood felled by the defendant did consist principally of hornbeam, fallow, hazle, and ash, and stub-oak and ash being tithable wood, and in the county of *Essex* never accounted timber; the court declare that the plaintiff ought to have tithe in kind for the same. But in regard there were some trees of oak and ash being seconds or standards, which, growing promiscuously on the said coppice, were felled, and the heads or tops thereof made into faggots, for which no tithe was due to the plaintiff; decree that it be referred to the auditor to take an account of what coppice-wood or underwood, or woods growing promiscuously on stubs, or stems, the defendant felled, and what

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M M

timber

1680. timber trees, or trees of oak, ash, or elm, commonly called second or standards, were felled by the defendant, and sold for timber and as to the coppice-wood or underwood, and wood growing on stubs or stems, the auditor is to compute the value, and what is due for the tithe thereof.

H. 32 Car. II. A. D. 1680. Scac.

Collard v. Newton. [Bunb. 37.]

General allegation of discharge sufficient.

THE defendant insisted, that the lands, where, &c. were discharged by bull, order, prescription, or some other way, and allowed to be good.

P. 32 Car. II. A. D. 1680. Scac.

Croft v. Blake. [MSS.]

Custom to tithe lambs on St. Mark's day
unreasonable.

A CUSTOM to tithe lambs on St. Mark's day, as insisted upon by the defendant, the court declared to be unreasonable; for that the tithe lambs were then not able to live of themselves; and that they are tithable when they can live without the dam, and when the occupier weans his own lambs, and not before.

Tr. 32 Car. II. A. D. 1680. Scac.

Ann. [MSS.]

Wild cherries
tithable.

A BILL for wild cherries (*inter al.*) the defendant insisted they were not tithable by law; but tithes decreed.

Tr. 32 Car. II. A. D. 1680. In Canc.

Pomfret v. Lander, Wain, and others. [Dodd's MSS. cited in Bunb. 344.]

Customs
tithable.

LITON in *Bedfordshire*: tithes of clover grass threshed, and made into horse-bread, and hogs fed with the feed; yet adjudged to be lay, and tithable to the vicar, who was endowed with lay, and not to the use of the impropriator, as a new or different tithes from lay.

Tr. 33 Car. II. A. D. 1681:

Camell v. Ward. [Decree Book, 20th June.]

THE scope of the bill was to compel the defendant, being the executor of *John King*, to set forth and discover what yearly profit the testator made in his life-time, of a decoy of fowl, in the parish of *Worlingham*, in the county of *Suffolk*, which the plaintiff alleged the said *John King* had been occupier of for several years, and wherein he had yearly taken and killed ducks, mallards, teals, and other fowls, and had eggs therefrom; whereby he made great profit, and ought to have paid to the plaintiff yearly, as rector there, the tithes thereof in kind, or made some composition to him for the same.

Tithes are not payable for a decoy of wild ducks, or for ducks or other fowl taken in a decoy, nor for the eggs of tame ducks kept for the service of a decoy.

The defendant said, that he knew not that *John King* was ever owner or farmer of the said decoy, but believed that he was servant to Sir *John Duke*, the owner thereof, and gave him an account thereof; that the said decoy was only of wild fowl, and that the plaintiff and his predecessors never, since the making of the said decoy about forty years ago, had paid any tithes for the same, or made any satisfaction in lieu thereof.

Upon opening the bill and answer, and upon debate of the matter, it appeared to the court, that the ducks taken in the said decoy were wild ducks, for which the court was of opinion, that tithes are not payable; and there being no proof of any custom for the payment of tithes for ducks and other fowl taken in decoys, or for the eggs of tame ducks kept for the service of the said decoy, the court was also of opinion, that tithes ought not to be paid for the eggs of such ducks.

The bill therefore was dismissed; but without costs.

Tr. 33 Car. II. A. D. 1681.

Margetts v. Butcher. [Decree Book, 13th June (b).]

THE bill stated, that for four years past, the plaintiff had been and then was farmer of the parsonage and rectory impropriate of *Sutton*, otherwise called *King's Sutton*, in the county of *North-*

Tithes are due of common right of aftermath.

(4) This cause came on first on the 9th of May 1681, and was then ordered to stand over for the opinion of the court.

1681.

ampton, and of all the tithes thereof; that there is an ancient custom within the said parish, that the occupiers of meadow and mowing grounds shall pay tithes of the *lattermath*, or *second crop* of grass or herbage cut in the meadows there, whereof the tithes of the first crop of herbage there mowed were set out in grass, and not made into hay, by the occupiers of such meadow ground.

The defendants, as to the tithes of the *lattermath*, said, that they had heard that the same had been sometimes paid by some landholders, but that they believed they were paid in their own wrong, and confessed that they had themselves paid the same in their own wrong.

It was insisted by the plaintiff's counsel, that there being no custom or prescription alleged or set forth by the defendants in discharge of these tithes, they ought, by *common right*, to be paid to the plaintiff.

But the court took time to advise of the same until the day after the term, when the court declared, they would further advise touching the payment of the tithes of the said *aftermath*, or after crop of grass.

The cause now came on for their judgement therein, and after hearing counsel on both sides, the court delivered their opinions *seriatim*, "that of common right, tithes of *aftermath* or of the "after crop of grass mowed (there being no prescription or custom against, or in discharge of the same) ought to be paid and "set forth by the defendants to the plaintiff."

M. 34 Car. II. A. D. 1682. In Canc.

Anon. [1 Vern. 60.]

If the executor of a parson bring a bill for tithes, he need not offer to accept the single value, he not being entitled by stat. E. 6. to the treble value.

A MAN having brought a bill for tithes, the defendant demurred, for that he had not offered by his bill to accept the single value, and yet had alleged in the bill, that the defendant had carried away the corn, &c. without setting forth the tithes according to the statute. And it was insisted for the defendant, that if he should be put to answer this bill, the plaintiff would presently go to law, and give his answer in evidence, and recover the treble value of the tithes: and a court of equity ought not to assist a man in recovering a penalty, nor compel a discovery of a forfeiture.

Afterwards

Afterwards at another day, upon a motion, this demurrer was over-ruled, the plaintiff in this case being only the executor of a parson and not the parson himself, and so not entitled to a forfeiture upon the statute.

Hil. 35 Car. II. A. D. 1683.

Fish v. Wimberley. [Decree-Book, 4th Feb.]

THE plaintiff, as vicar of the vicarage and parish church of *Gedney*, in the county of *Lincoln*, demanded the tithe of *coleseed*.

Coleseed, though sown in fields, and in large quantities, is a *small tithe*.

The defendant *Wimberley* acknowledged, that since the plaintiff's induction he had occupied in the said parish several acres of new improved lands, and had reaped therefrom *coleseed*, the tithes whereof he did not set forth to the plaintiff, because, by law, he should not have been charged with any for seven years to come.

The defendant *Waterfall* confessed, that he had reaped several acres of *coleseed*, the tithes whereof he did not set out to the plaintiff, because it was newly improved ground, and he had agreed with the plaintiff for the tithes of the *coleseed* for 10 l. and that he believed *coleseed* was a *great tithe*, and belonged to the rector of *Gedney*, and not to the vicar.

Upon reading the endowment of the said vicarage, dated in the year 1209, and also the depositions of witnesses taken on both sides, it plainly appeared to the court, as well by the endowment as by the testimony of the said witnesses of the usage there, that the vicar of the said parish was endowed with, and accordingly did always, from time to time, receive and take, not only all manner of small tithes within the said parish, but also all tithes whatsoever, other than the tithes of corn; and that the rector had the tithes of corn only, and no more, within the said parish.

And upon debate of the matter, the court delivered their judgement unanimously, that the tithe of *coleseed* is a *small tithe*; and the plaintiff being endowed with or being possessed of all manner of small tithes within the said parish, it is ordered by the court, that the defendant *Wimberley* do forthwith satisfy and pay to the plaintiff the value of the tithes of the *coleseed*, which he inncd in the said year; and that it be referred to the deputy remembrancer to state the values thereof; and that the defendant *Waterfall* do pay to the plaintiff ten pounds, in full for his tithes of *coleseed* according to agreement; with three pounds for his costs.

C A S E S.

Tr. 36 Car. II. A. D. 1684. In Canc.

Bonsey v. Lee. [1 Vern. 247.]

WHERE there is no vicarage endowed, the impropiator of the small tithes is bound to maintain a priest; and upon an information by the attorney general for that purpose, the king may assign to the curate such an allowance or proportion of the small tithes, as he shall think fit: but otherwise it is, when the vicar is endowed, though but of never so small a matter. The case of *The King and Sutton* in the king's bench was cited.

M: 1 Ja. II. A. D. 1686.

Somerfet v. Fotherby. [1 Vern. 185.]

Bill lies to perpetuate the testimony of witnesses to prove a *modus*. But *quære* if it will lie to establish a *modus*.

THE bill being to examine witnesses *in perpetuam rei memoriam* to prove a *modus decimandi*, the defendant demurred, for that the bill was to establish a custom against the church, and in prejudice of tithes, that are due of *common right*; and several precedents were cited, where bills to have a *modus* decreed were, upon a demurrer, dismissed. But this bill being only to preserve testimony, the lord-keeper thought it reasonable the defendant should answer, and over-ruled the demurrer.

H. 2 & 3 Jac. II. A. D. 1687. Scac.

Croftman v. Goodrick. [Bunb. 26.]

Value of tithes, ascertained by plaintiff's oath, on consent, where bill for tithes taken *pro confesso*. 1 Wood 254. S. C.

UPON payment of the costs, the value of the tithes was ascertained by the oath of the plaintiff himself, by consent, the bill for tithes being taken *pro confesso*, the defendant having stood out till a sequestration.

P. 4 Jac. II. A. D. 1689. In Canc.

Buxton v. Hutchinson. [2 Vern. 46.]

THE plaintiff's bill was to be relieved for tithe ore in *Brassington*, a township within the rectory of *Blackborne*, in the county of *Derby*.

Tithe ore not due, but by particular custom. 2 Vern 46. pl. 43.

By the court. Tithe ore is not due of common right, but by particular custom only; and the court therefore directed a trial to be had at law, whether there was any and what custom, within the said township, for the payment of tithe ore, with direction for the judge to indorse the *poslea*, how the custom was found upon the trial.

Term,

Jac. II.

In the *Exchequer*. [Dod's MSS. Rayn. 68.]

THIS case was before the lord chief baron *Mountague*, viz. arable land pays tithe in kind to the impropiator; *cinquefoil* was sowed upon this land, and it stood to seed, and the profit was in the seed, and not in the stalk; there was a custom of two-pence an acre for hay, payable to the vicar; and it was resolved, that notwithstanding the stalk and seed were in nature of corn, yet it should be looked upon as grass, and payable accordingly.

The seed and stalk of, *cinquefoil* to pay tithe as grass.

H. 1 W. & M. A. D. 1690. Scac.

Edgerton v. Follett and another. [Decree-Book, 20th Feb.]

THE plaintiff, as rector of the rectory and parish church of *Lympston*, in the county of *Devon*, demanded tithes of apples in kind.

A custom to pay 4d. a hogthead of cyder, in lieu of all tithe apples and other orchard fruit, is void in law.

The defendants insisted, that the tithe of apples ought not to be paid in kind, for that a *modus* of four-pence for every hogthead of cyder had been, for time beyond memory, paid to the rector there, in lieu of all orchard fruit growing within the parish.

The court was of opinion, that the pretended *modus*, set forth in the answer, in discharge of orchard fruit not made into cyder, is a void custom in law.

1690-1.

H. 2 W. & M. A. D. 1690-1. Scac.

Edge v. Oglander. [Bunb. 301.]

Modus of 8l. for a farm of 8ol. a year, good.

A *Modus* of 8l. for a farm of 8ol. a year, was allowed to be a good *modus*.

Tr. 2 W. & M. A. D. 1691. Scac.

Streaton v. Downes. [MSS.]

BILL by vicar for tithes; defendant insisted he was tenant of the glebe lands under *Eaton* college, and that no tithe for that land was due to the vicar. *Per cur.* In regard the glebe land of which the plaintiff demands tithe is not of common right tithable to the plaintiff, and the plaintiff has not made any sufficient proof of payment of tithes to him for the same, let the bill be dismissed.

Tr. 3 W. & M. A. D. 1692. Scac.

Stump v. Ayliffe. [Dodd's MSS. Rayn. 72.]

The king's books conclusive evidence, as to the value of a living.

THE defendant to a tithe bill insisted, that the plaintiff had taken a second living of above 8l. a year; but by the court, defendant decreed to account; for though the real value is above 8l. yet in the king's books (which is the conclusive rule) it is under. See *Dy.* 237. *Cr. El.* 853. *Cr. Car.* 456. *S. Degge* 29. [2 *Lutw.* 1305. 17 *Vin. Abr.* 362.]

Tr. 3 W. & M. A. D. 1692. Scac.

Pettit v. Churley. [Dodd's MSS. Rayn. 72.]

Quere, whether alienage a good plea to a bill for tithes.

PLEA to a tithe bill, that the plaintiff was a *Frenchman*, and not capable of a benefice by statute; which is printed in *Rastal.* The court doubted. See *Ral. Abr. tit. Pre-sentment* 348.

H. 3 & 4 W. & M. A. D. 1692.

Sanders v. Ryall. [MSS.]

A VICAR endowed with the glebe has a right to the great tithes growing thereon, although he has no right to the great tithes in general in the parish. So held. Rayn. 74. S. C.

N. B. In this case the vicar had let his glebe which was sowed with corn, and he then died. The court decreed, that the next vicar should have the tithe of the corn, and not the impropriator.

Tr. 4 W. & M. A. D. 1692. Scac.

Berwick v. Swanton. [Bunb. 192.]

IT was resolved, that a sequestrator could not bring a bill alone for tithes; because he is a bailiff, and accountable to the bishop, and has no interest. Sequestrator cannot bring a bill alone for tithes. 1 Wood 295.

H. 5 W & M. A. D. 1694. Scac.

Daniel v. Tuffnall. [Dodd's MSS. Rayn. 75.]

RESOLVED, That if the occupier sows turnips, and then agifts the sheep of a stranger, or fattens his own sheep, and sells them, he shall pay tithe for the herbage, or agiftment, notwithstanding the turnips are sowed on the fallow ground, (as they were in this case), and meliorate the land for corn: so also, if the turnips are sold, and profit made, tithe shall be paid for them. Occupier sows turnips, and then agifts the sheep of a stranger, or fattens his own, and sells them; he shall pay tithe for the herbage or agiftment; though the turnips are sowed on fallow ground, and meliorate it for corn.

H. 5 W & M. A. D. 1694. Scac.

Tafwell, Parson of Woodnorton, in the county of Norfolk, v. Athill.

[Dodd's MSS. Rayn. 75.]

A SELLS the toppings and loppings of oak, ash, and elm to B. standing; B. cuts them down; the parson brought his bill for tithes, against A. and B. Resolved, Lessee of uncut toppings and loppings of oak, ash, and elm, not liable to pay tithe for them.
I. That the bill, as against A. who sold them uncut, be dismissed, notwithstanding the case of *Franklin* against *Jones*, 2 Jac. II.
II. That

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but was passed for the maintenance of preaching ministers; and therefore, that the said defendant is chargeable with, and after the rate of 2 s. 9 d. in the pound, unless he can make it appear, that there is some ancient or customary rate or payment in lieu of tithes.

The plaintiffs in this case submitted to accept the said rate of 1 l. 16 s. *per annum* formerly paid for the house and premises in question, which appeared to be of the yearly value of 40 l. if the defendant (as he had formerly done) would continue to pay the same, which he, being present in court, refused to do.

It was thereupon ordered and decreed, that the defendant should pay to the plaintiffs or their assigns the arrears of the tithes of the said house and premises in his occupation, for the three years in the bill mentioned, ended 25th of *March* 1692, at 2 s. 9 d. in the pound rent, or value of and for his said house and premises, the same to be rated and valued at and after the rate of 30 l. *per annum*, for the yearly rent or value of the said house and premises, during the said three years, which the plaintiffs submitted to accept, though proved of a greater value in the cause; which arrears being computed in court did amount yearly to 4 l. 2 s. 6 d. and for the whole three years, ended the 25th of *March* 1692, did amount to 12 l. 7 s. 6 d. according to the said decree made in 37 *H.* 8. for the payment of tithes in *London*, which sum the said defendant was thereby ordered and decreed forthwith to pay to the plaintiffs or their assigns.

Tr. 5 W. & M. A. D. 1694. Scac.

Bordley v. Tims. [MSS.]

Tithe of turnips payable, though the turnips raised on land that has in the same year yielded tithe of corn.

BILL for tithe of turnips. Defendant insisted no tithe was due for turnips sowed after corn the same year; and that they ought to pay no tithe for any crop or profit of arable land the same year that the parson received tithe corn of the same ground. The tithe decreed.

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M. 5 W. & M. A. D. 1693. Scac.

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Grant v. Cannon. [Decree-Book, 20th Nov.]

THE plaintiff being seised in fee of and in the impropriate rectory of *St. Dunstan's in the West*, within the city of *London*, and county of *Middlesex*, and the hamlets thereto belonging, claimed tithes by virtue of the statute 37 H. 8. c. 13.

The *Red Hart Inn*, in *Fetter-Lane*, is within the city of *London*, and not within the liberty of the Rolls.

The defendant confessed, that he was owner of the *Red Hart Inn*, in *Fetter-Lane*, but denied that any part thereof was in the city of *London*, and said that the same is within the liberty of the Rolls, which liberty is exempt from the payment of tithes. He confessed that he held the said inn, and let the other tenements.

On debate of the matter, and reading the depositions taken on behalf of the plaintiff, whereby it plainly appeared that the premises in question, in the defendant's occupation, were within the liberty of the city of *London*, the court was of opinion, that the defendant ought to pay after the rate of 2s. 9d. in the pound, according to the statute 37 H. 8. c. 13.

M. 5 W. & M. A. D. 1693. Scac.

Kenyon v. West. [Decree-Book, 23d Nov.]

THE vicar of *Warfield*, in the county of *Berks*, by his bill stated, that in the years 1690 and 1691 the defendants had brought up divers calves, which they sold, or killed and converted to their own use, without paying him the tenth part of the value of such calves for the tithes thereof, but instead thereof would oblige him to accept of the shoulders of such calves when killed, without any custom or law so to do.

The owner of a single calf shall, of common right, pay the tenth part of its value when taken from the cow, in lieu of tithes.

The defendant *West* confessed that he had one calf, which he sold for 35 s. reserving a shoulder for the plaintiff, which he sent, but that the plaintiff refused to receive it.

The defendant *Bowyer* said, that he owed to the plaintiff for the tithes of two calves, one whereof he had weaned from the pail, and the other he had sold, but had reserved a shoulder for the plaintiff, which he tendered to him, and that he had refused to accept of it.

The question was, whether of common right a single calf is tithable or not; and if tithable, then how and after what manner the tithes thereof ought to be paid?

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The court, upon debate of the matter, was of opinion, that one calf is tithable; and that the tenth part of the value thereof, when taken from the cow to be sold or killed, ought to be paid for the tithe thereof.

M. 5 W. & M. A. D. 1694. B. R.

Underhill v. Durham. [MSS.]

Freem. 509.
S. C.

IN 1647 the parliament issued commissions for surveying all the crown and church lands in *England*. Copies of the surveys after they were returned were deposited in most of the cathedrals in *England*. The originals were burnt in the fire of *London*. Ruled, on a trial at bar, that the originals, though taken on commissions granted by a usurped government, were good evidence, because the grantors were then in actual possession of the government, and all acts in judicial matters ought for peace and convenience to be ratified. Therefore as the originals are lost, and the copies kept in unsuspected places of which a good account may be given, they ought to be read. The like was ruled at *Stafford* assizes in 1738 in *Swinton* and *Digby*, in a case about a custom to be free from tithe wood in the hundred of *Offlow*, where such copies of surveys kept in the cathedral of *Litchfield* were read. From Mr. *Ford's* notes—At *Bridgewater* summer assizes 1738 between *Bagshaw*, lessee of Sir *G. Wynn*, and bishop of *Bangor* and *Manley* and others, on a question about the bounds of a manor; a copy of the survey of *Denbigh* manor taken in 1649 from the augmentation office was objected to, because as these surveys were taken by virtue of commissions, those commissions ought to be produced. But the copy was read, and the above case of *Underhill* and *Durham* was cited. *Ibid.*

M. 5 W. & M. A. D. 1694. Scac.

Biggs v. Martin and Letts. [Decree-Book, 18th June.]

Tithe is due of broom made into bays; of the tops of old timber pollards, and of wood growing in hedge-rows.

THE plaintiff, as farmer and occupier of the rectory or parsonage of *Bromley*, in the county of *Kent*, stated, that the defendants were inhabitants, and, in the years 1691 and 1692, occupied several farms, and agisted dry and unprofitable cattle, and cut wood and broom, and made the same into bays, and disposed thereof without setting out the tithes.

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The defendant *Letts* set forth several customs within the said parish payable in lieu of tithes, and averred that he had paid for all his tithes, except 4 s. 4 d. for the small tithes for the year 1692; and he denied that any tithes ought to be paid for *broom made into bays*.

The defendant *Martin* confessed, that he had not paid his rate tithes, but denied that any tithe was due for the tops or lops of *old pollard timber trees* or dotards, or for wood growing in hedge-rows.

The court, upon reading several depositions, and hearing what could be alleged on both sides, ordered and decreed, that the defendants do pay to the plaintiff what, upon the account to be taken before the deputy remembrancer, should appear to be due for the tithe of *broom made into bays*; for the tithe of the lops and tops of *old pollard timber trees* and dotards; and for wood growing in hedge-rows, together with such customary payments as were in arrear and due for the years afore said.

H. 6 W. III. A. D. 1695. Scac.

Goodall v. Perkins. [Decree-Book, 4th Feb.]

THE rector of *Padworth*, in the county *Berks*, charged that the defendant, for several years past, had occupied and possessed twenty acres of *coppice-wood* and five hundred poles of *hedge-rows*, and had cut and carried away about eighty loads of the wood growing there; the tithes whereof were worth eight pounds, which the defendant refused to pay.

Aldern poles, though of trees above 20 years standing, and coppice-wood made faggots, which are not burnt in the parish, are tithable.

The defendant confessed that he had been for several years past owner and occupier of a coppice-wood called *Brickcroft*, and certain lands called *Wallingford Lands*, and of some hedge-rows within the said parish; that in the years 1687 and 1688 he cut and carried away from the said coppice alder poles; and he set forth the quantities and values for several years following; that he had cut several hundred of faggots from the same coppice, which he used for fire-wood in his own house; and he insisted that he was not obliged to pay any tithes, either for the alder poles or for the faggots, for that the alder poles were all above twenty years growth, and of that age and quality have been, and are usually reckoned and esteemed as timber, and measured by timber measure; and the said faggots were not tithable, in regard they were part thereof burnt, and the rest intended to be burnt in his own dwelling-house, and that for wood burnt in the houses of the owners tithes were not due.

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The court declared their opinion, that aldern poles were not timber, but were tithable to the plaintiff.

And in regard it appeared to the court, that the defendant had not any house of husbandry within the said parish of *Padworth*, but that the said underwood and hedge-rows, made into faggots, were carried to the defendant's house, being out of the said parish, and there burnt, the court did also declare, that tithes were due to the plaintiff for the same.

It was therefore ordered and decreed, that the defendant should account with and satisfy the plaintiff for the value of the tithes of all the said aldern poles and underwood by him felled and cut within the said parish of *Padworth* demanded by the bill.

P. 6 W. III. A. D. 1695. Scac.

Wilbraham v. Saunders. [Dodd's MSS. Rayn. 76.]

No tithe
herbage for
trespassing
cattle.
1 Wood 329.

A.'s farm adjoins to *B.*'s in the parish of *C.*; the fences of *B.* being down, *A.*'s cattle escape there, and eat there in the parish of *C.* for four months.

Resolved, that the parson of *C.* should not have tithe herbage, for they were as trespassers; and *Letchmere* cited the parson of *Bangor*'s case, that tithes shall not be paid for cattle which common *par cause de vicinage*. But *Powel contra*; in the present case, *A.* is a disseisor, and shall pay tithes; for it is not an accidental trespass, but a continued act; but it seemed clearly the contrary to Mr. Dodd the reporter.

Tr. 6 W. & M. A. D. 1694. Scac.

Grant v. Brown and another. [Decree-Book, 20th Nov.]

White Friars is within the liberties of the city of *London*, and was so when the 37 H. 8. c. 2. was passed; but it was not within that part of the parish of *St. Dunstan in the West* which is in the city of *London*.

THE plaintiff stated, that Mrs. *Jevan*, at her death in the year 1691, and for twenty-five years before, was seised in fee of the parsonage or rectory of *St. Dunstan in the West*, in the city of *London*, and county of *Middlesex*, and entitled to tithes, &c.; that she made her will in September 1691, and devised the said rectory to the plaintiff, and made him sole executor; that he proved the said will, and was legally entitled to the said impropriation, and to all arrears of tithes due in her life time; that the statute 37 H. 8. c. 2. enacted, "that the citizens and inhabitants of the city of *London* should
" yearly,

"yearly, without fraud, pay of every 10 s. rent of all houses, shops, cellars, &c. 16½ d. and for every 20 s. the sum of 2 s. 9 d.;" that the defendants were for several years in the lifetime of Mrs. *Jean*, and also since, tenants, inhabitants, and occupiers of several houses, shops, and cellars, within that part of the parish that is within the city of *London*. The bill therefore prayed to have an account of what houses the defendants severally held, what time they had occupied the same, and what rents they had paid for the same.

The defendants set forth and specified the particular houses by them occupied, and the rents and values of the same, and insisted that all the said houses were situate in the precinct called *White Friars*; that the said precinct was no part of the city of *London* at the time of making the decree and act of parliament in 37 H. 8. but that the same was made part of the liberty of the city of *London* by the late king *James* the first, and subjected to the jurisdiction thereof by grants and letters patent, and therefore the said act and decree did not extend to or concern the defendants. They also insisted, that the precinct of *White Friars* was not within the parish of *St. Dunstan in the West*, or the rectory or tithable places thereof, and denied that any rate or *modus* for the tithe was ever payable or paid by them to the parson of the said parish.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and, upon reading several depositions on both sides, as also copies of several ancient records and grants from the crown, a trial at law was directed to be had before the chief baron (i) upon these two issues, *viz.*

First, Whether the precinct of *White Friars* was within the liberty of the city of *London* at the time when the act was made in 37 H. 8.?

Secondly, Whether the precinct of *White Friars* be within the parish of *St. Dunstan in the West*?

The issues were accordingly tried, and the one issue found for the plaintiff, and the other for the defendants; but a new trial upon the said issues was ordered on payment of costs to the defendants; on which trial, before a special jury, it was found upon the first issue, "that *White Friars* was within *London* at the time the statute was made." But upon the second issue, "that the precinct of *White Friars* was not within the parish of *St. Dunstan in the West*."

(i) The cause was tried before Mr. Baron *Leechmere*, the office of chief baron being at that time vacant.

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The cause came on to be further heard on the third of *June* 1694; when, upon reading the said orders and *postea*, and hearing counsel for the defendants, it was ordered that all the defendants should be absolutely dismissed from the said bill; but, before the said order was entered, the plaintiff's counsel, on the 8th of *June* instant, alleging the cause was brought on sooner than expected, it was ordered to come on this day; and on full debate, it is ordered by the court, that the said bill be, and is hereby dismissed.

Tr. 6 W. & M. A. D: 1694. Scac.

Sayer v. Mumford and others.

The plaintiff, as lessee under *Baliol College*, in *Oxford*, claims from the defendants 2s. 9d. in the pound on their respective rents in lieu of tithes, pursuant to the statute 37 H. 8. c. 12.

THE bill stated, that the master and scholars of *Baliol College*, in *Oxford*, are seised in fee of the rectory or parsonage impropriate of *St. Lawrence Jury*, in the city of *London*, and entitled to all tithes, oblations, ecclesiastical duties, and all customary and other payments in lieu of tithes within the said parish; that being so seised, they, by indenture dated the 26th of *March* 1692, demised all and singular the said tithes, and other ecclesiastical duties and payments to the plaintiff for 21 years, under the yearly rent of 40 l. 7 s., payable, *viz.* to the master and scholars, 20 l. 7 s. a-year; and to the vicar of the church, 20 l. a-year; by virtue of which lease, he is entitled to have the said tithes and other ecclesiastical duties for a year and upwards, or else such payments in lieu of tithes as are by custom or common right, or by the decree made in 37 H. 8. due to him; that, time out of mind, there hath been paid by the parishioners, inhabitants and occupiers of houses and other tithable matters within the said parish, to the proprietors of the said rectory, a customary pound rate for or in lieu of tithes, or else, according to the said decree, for every 10 s. rent, 1 s. 4½ d. *per annum*; and for every 20 s. rent, 2 s. 9 d. *per annum*, and so above that rent, according to the said rate; that the defendants, or some other of the parishioners, have, for 60 years or upwards, been lessees of the said rectory under the said master and scholars, during which time great alterations were made in the buildings within the said parish by reason of the great fire, so that the plaintiff cannot discover what the ancient tithes were, or of whom to demand the same; and they having gotten into their hands all the ancient books, terriers, and writings relating to the said tithes, do deny to pay the plaintiff any tithes, or any customary or other payments in lieu of tithes, or

accord-

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according to the aforefaid decree of 2 s. 9 d. in the pound. The bill therefore prayed, that the defendants might difcover what houfes or other things tithable in the faid parifh they were poffeffors or occupiers of during 1692, and the time they were charged to be in arrear for their tithes, together with the yearly rents and values thereof, and what customary or other fums of money they have paid for or in lieu of tithes, or have known to be paid by others, and that they may difcover and deliver up the ancient books, &c. and pay the plaintiff their tithes or the customary rate purfuant to the decree.

The defendants, by their answer, confeffed the plaintiff's title to the tithes, but faid they did not know of any customary rates for affeffments or payments of tithes, or any fum of money in lieu thereof, or that any oblations, obventions, or other ecclefiaftical duties had been paid, or were payable, other than in the affeffments annexed to their answers, which were made by the ftatute 22 & 23 C. 2. c. 15. intituled, "An act for the better fettlement and maintenance of the parifons, vicars, and curates, in the parifhes burnt by the late dreadful fire." And the defendants fet forth the yearly rents of their houfes, and other things in their poffeffions, and confeffed, that fome of the inhabitants in truft for the faid parifh had been leffees of the faid tithes upon feveral leafes for the time in the bill mentioned, the laft whereof, being made to the defendants *Caplin* and others, expired at *Lady Day* 1692; and that the churchwardens had ufually collected the faid tithes, and that they are indebted to the plaintiff for the fum rated in the affeffments upon their houfes from the end of the faid leafe, which they were ready to pay.

The defendants plead the ftatute 22 & 23 Car. 2. c. 15.

The plaintiff replied; the defendants rejoined; but no witneffes were examined; and upon reading an old book relating to the faid tithes in 1643, and feveral old books and writings produced by both fides, and on full debate of the matter, it was ordered and decreed (*k*), that the defendants fhould refpectively account to the plaintiff for the tithes of the feveral houfes and other tithable matters in their poffeffion, after the rate of 2 s. 9 d. for every pound of the yearly rents or values thereof from the time the laft parifh leafe expired, being at *Lady Day* 1692, to the time of exhibiting the faid bill; and it was thereby referred to the deputy remembrancer to take the faid account accordingly.

The defendants ordered to pay their tithes purfuant to 37 H. 8. c. 12.

(*k*) by *Turton* and *Powell*, barons.

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In pursuance of the said decree the deputy remembrancer made his report, dated the 15th of *October* last, and the cause, being in the paper, came on to be heard the 25th of *October* last, when, upon reading the order and report, and hearing counsel on both sides, it was ordered to stand over for the court to consider of costs.

A rehearing granted.

Upon the 6th of *November* instant, on an application by the defendant's counsel, and on reading a petition for a rehearing, and the plaintiff's counsel opposing the same, it was ordered that the cause should be reheard this day, and that the defendants should pay 5 l. costs for the rehearing, together with 3 l. costs for the last day's attendance.

The former decree confirmed.

On the 15th of *November* 1694, upon hearing counsel; and on reading the said act of parliament made in the 22 & 23 *Car. 2.*; and also on reading the report, and on full debate, it was ordered and decreed by the lord chancellor (1) and the barons (m), that the former decree, and also the report, should be, and were thereby ratified and confirmed, and that the said defendants respectively pay to the said plaintiff the several sums reported due from them, with the plaintiff's costs, to be taxed.

M. 6 W. & M. A. D. 1694. Scac.

Umfreville v. Batchelor and others.

Tithes decreed to the personal representative of the impropriator for houses in *London*, at the rate of 2s. 9d. in the pound.

THE plaintiff, as executrix of the last will and testament of her late husband deceased, did, in *Trinity Term*, in the 22 *Car. 2.* exhibit her bill against the defendants, to have 2 s. 9 d. in the pound for tithes due in the lifetime of her late husband, he being owner and impropriator of the parish of *St. Botolph without Aldgate*, part of which parish lies within the liberties of the city of *London*, and the other part in the county of *Middlesex*, and the defendant *Batchelor* being occupier of several houses within that part of the parish which lieth within the liberty of the city of *London*.

The defendant by his answer stated, that, for the time demanded by the bill, he had been occupier of one house in *Rose and Crown Court*, in *Houndsditch*, and of another house in *Covent Garden*, otherwise called *Gravel Lane*, within that part of the parish which lieth within the liberty of the city of *London*.

(1) *Montague*, chancellor.

(m) *Nich. Lechmere, John Turton, and John Powell.*

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The plaintiff replied; the defendant rejoined; and witnesses were examined on the part of the plaintiff: and, upon opening the bill, and reading an affidavit of the service of *subpœna* to hear judgement, and reading the answer, and no counsel appearing for the defendant, the court (n) ordered, that the defendant should satisfy the plaintiff 2s. 9d. in the pound, according to the 37 H. 8. c. 12. for the house in *Rose-and-Crown Court* in *Houndstitch*, and in *Covent Garden*, otherwise *Gravel Lane*, in that part of the said parish of *St. Botolph without Aldgate*, which lieth within the liberties of the city of *London*, for the time demanded by the bill.

H. 7 W. III. A. D. 1696. Scac.

Stephens v. Martin. [Bunb. 169.]

DETERMINED, that tithes of peas and beans are never paid to the vicar but always to the impropiator, without an endowment or usage to the contrary; and this decree was affirmed upon an appeal to the house of lords.

Tithes of peas and beans never paid to the vicar without endowment or usage.

Tr. 7 W. III. A. D. 1695. Scac.

Griffiths v. Williams. [MSS.]

It appearing to the court, that the defendant had paid all his tithes to the plaintiff, except for six calves, for each of which, by custom only, a halfpenny was due, and this being so minute, the court declared the bill to be vexatious, and dismissed it.

Where the tithe claimed is very trivial, the court will dismiss the bill as vexatious.

(*) *Montague*, chancellour, *Leckmere*, baron.

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H. 8 W. III. A. D. 1696. B. R.

Hicks v. Woodson. [4 Mod. 336.]

Neither a hundred nor county can prescribe in *non decimando* for the agistment of cattle.

S. C. 2 Salk. 655. S. C. Carth. 392. S. C. Comb. 403. S. C. Holt 671. S. C. Skin. 560. S. C. 12 Mod. 111. S. C. 1 Ld. Rayn. 137. S. C. Raym. Ent. 170.

PROHIBITION. The plaintiff suggested, that the parish of *Huntspill* is an ancient parish, of which he was an inhabitant, and used lands there; that in the said parish there is a *custom* to pay several small sums to the parson in lieu of *small tithes*, which sums were particularly set forth; that this parish was within the hundred of *Huntspill*; and that there is a custom also for every inhabitant and occupier of lands within the said hundred to be discharged of tithes for the pasture of barren and unprofitable cattle. The defendant traversed the customs; and issue being thereupon joined, it was found for the plaintiff.

And now it was moved in arrest of judgement,

First, That a custom alleged in *non decimando* in a whole hundred is void in law.

Secondly, Admitting it to be good, yet it was not well pleaded here; because the plaintiff had not shewn that there was a sufficient maintenance for the parson besides those tithes.

First, It was argued that this custom was against common right, because there was never yet any precedent of a custom to discharge a layman in *non decimando*. It is agreed, that as to ecclesiastical persons, such a custom may be good, but not as to a layman, because he was not capable at the common law to have tithes, and therefore could not sue for them in the spiritual court, but now he is enabled by the statute of 32 H. 8. c. 7: And as, tithes in general are due of common right, so this particular tithe of agistment of barren cattle is due the rather, because those which are for the cart are discharged by custom; it is the whole profits of the land out of which some things must be paid to the parson. A layman is allowed to prescribe in *modo decimandi*, but not to be exempted from all tithes in general, because some must be paid and are due of common right, though the quantity be ascertained by custom and usage. If therefore tithes are due of common right, such a prescription either in a *hundred* or a *county* will not be good, because, if it should be allowed, every person in that hundred or county might prescribe; and nothing would be left for the parson. It is true, my lord *Rolle* affirms the contrary, but he denies it again in the same line; which shews that book to be of little authority in this case. It is likewise said

find in the same book, that a prohibition was granted in a case of the same nature with this, which was thus, viz. A man prescribed under a custom within two hundreds of *Middlesex* and *Surry*, that if a common baker dwelling in either of the hundreds should erect a mill there to grind corn for his trade, and sell it to customers in or near those hundreds for their sustenance, such a baker should pay no tithes for the corn. But the reason upon which that case was adjudged does not suit with this; for the parson there had more and greater tithes out of the lands of the inhabitants, and of them who were sustained in those hundreds, than he could have by the manual occupation of a miller. In *Michaelmas Term* in 11 Car. 1. and in the same book, it is mentioned, that a prohibition was granted upon a surmise that tithes ought not to be paid for pheasants eggs, or young pheasants hatched in woods inclosed in the chiltern of *Buckinghamshire*; but that was because they were *feræ naturæ*. Such a custom as is here alleged could never have a reasonable commencement, because of common right tithes ought to be paid out of all land; and though before the council of *Lateran* no person could claim them, because there were no parishes, yet still they were due to the church, though it was in the power of the donor to give them to what spiritual person he thought fit. It is *in favorem ecclesiæ* that the law will not allow a prescription *in non decimando* to prevail against her. It is true, a prescription strengthens all other titles, but is of no force when pleaded in discharge of tithes, because the law presumes that a layman cannot be absolutely discharged without the consent of the parson, the patron, and the ordinary; and then likewise the grant of such discharge or exemption must appear. This was the opinion of *Dodderidge*, justice, grounded upon the authority of *Lindwood*, and of the author of the *Doct̃or and Student*. The whole country may be discharged of tithes, but such discharge ought to have a reasonable commencement, which must be shewed. Now it would be very strange that the law should reject a prescription to be discharged of tithes in a particular place, and yet allow a custom in a whole hundred *in non decimando*. One single instance may be given where such a custom has been allowed; it is in my lord *Rolle's Abridgement*, and it was for the milk of ewes; and probably the reason might be, that such milk is of little value to the parson, and does not much contribute to his maintenance, for which tithes were originally ordained; but it is but one single case, which does not make a law. The case of *Ruffel v. Backhurst*, which seems to give some colour

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654. pl. 13.

1 Ro. Abr.
636.

11 Rep.
Hob. 296.

2 Bull. 285.

1 Ro. Abr.
64. pl. 12.
Litt. Rep.
152., 2 Inst.
653.

2 Bull. 285.

1696. to such a custom, is a controverted case ; it was thus : The parson libelled for tithe-wood, and the defendant prayed a prohibition by reason of a prescription *in non decimando* for wood growing in the weald of *Kent* : it is true, the prescription there was denied, and no prohibition granted : this was in *Michaelmas Term* in 12 *J.* 1. ; and yet but two years afterwards there was a trial at bar in this court upon a prohibition, where such a prescription was suggested to be discharged of tithes of the underwood growing in the weald of *Suffex* ; and it was found for the plaintiff ; and the court held the prescription good. But, admitting such a prescription *in non decimando* for underwood in a weald be good, yet it will not affect this case, because in ancient times there were many controversies about such tithes ; for at the common law tithes were not to be paid for trees, because cutting them down is not an increase of their growth as of corn, but a total destruction ; it is an uncertain profit, and not arising yearly for the maintenance of the parson ; neither are those tithes due of common right, but by custom and usage ; and therefore in those days, and in those places where tithe-wood was due only by custom, the parishioners procured wood or other lands for the parson and his successors in satisfaction of all tithe-wood in the same parish. Several petitions have been made to the parliament concerning the right to such tithes, until the statute of *sylva cædua* was made, by which all those controversies were ended ; it being enacted, “ that tithes shall not be paid for wood of 20 years growth “ or more,” which implies it shall be paid for all under that age.
- 1 Ro. Abr. 653. pl. 10. It is true, it was the opinion of my lord *Coke*, that such a prescription in a county, not only for wood, but for any other tithe, is good ; but that can be no reason why it should be allowed in a hundred, because the court cannot judicially take notice what a hundred is, or
- 23 Rep. 13. what it comprehends ; it is a liberty in its commencement ; it is to have a jurisdiction over a hundred vills, or so many parishes ; and therefore it has been held, that a leet cannot be parcel of a hundred, because they are both liberties, and one liberty cannot be parcel of another. But it does not appear by the pleading, that there is more than one parish in this hundred ; if so, such a custom in a parish can never be made good. Besides, there is no consequence to say that there is such a custom in a county, therefore it may be in a hundred, because there can be no inference from one to the other ; and even in that case it will be very difficult to find a reason how a county at first came to be exempted from payment of tithes. My

lord *Rolle* uses the words "province" and "county" as synonymous: now "a province" being only a circuit within the jurisdiction of an archbishop, probably, there might be an agreement between the clergy and the laity that such a place, &c. should be exempted from the payment of tithes; but there could be no such agreement in a *hundred*, because that was divided from the county, and became a particular district and the inheritance of several persons, but the bailiwicks thereof were re-united to the counties by the statute of 4 E. 3. c. 15. and 14 E. 3. c. 9. It is agreed on all sides, that a single parish cannot have such a custom; and this is a strong reason why a *hundred* cannot, because it consists and is made up of several parishes; and it is as good a reason that a *hundred* cannot have such a custom because a *parish* cannot, as it is to say a *county* may, and therefore a *hundred* may have it.

Secondly, But admitting a hundred to be capable of such a custom, yet it cannot be so large as this, because there must be a sufficient maintenance left for the parson, which does not appear in this case; and so are all the books where such prescriptions have been allowed, which are very few, but never to have such effect as this, viz. to take away the maintenance of the parson; and therefore the plaintiff in the prohibition ought to have shewn that there was sufficient for him besides, because it is a discharge against common right, and no other reason can support it, but to shew that the parson has *uberiores decimas* besides the tithes alleged to be exempted; and this was the only reason of the judgement in the case of *Kidder v. Edwards*.

1 Ro. Abr.
654. pl. 138

E contra. If there may be a custom (as it is admitted) to be discharged in a whole county of tithe-milk, and of tithe-corn ground at such a mill or mills in a hundred, there may be also a custom to be discharged of the tithes of fat cattle, and if the parson has lived without such tithes time out of mind, he may live so still. It is granted on the other side, and an authority was produced of a custom to be discharged of tithes out of two hundreds, and there can be no reason, if that is law, why such a custom may not be good in one hundred. It has been objected, that a layman cannot prescribe *in non decimando*, but no good reason can be given for it. It cannot be because of any disability in his person; for as to this matter there is no difference between a *layman* and a *clerk*; it must therefore be *in favorem ecclesiæ*, and introduced by ecclesiastical persons who were formerly judges here, as part of the canon law,

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law, who had in those days such a power over the laity, that they would not suffer such a prescription to be tried by them, neither would they suffer them to sue for tithes in their courts. This is the reason why it is generally said in our books that a layman cannot prescribe *in non decimando*; but, though he cannot prescribe, &c. yet there may be a custom to exempt him from tithes, and such a custom is of as good authority as a prescription; for if it is established by long usage and by the common consent of our ancestors, it passes into a law of that place, and is of equal force with a prescription. Such is the custom of *gavelkind*, and *borough English*, which is the law of *England*, and as ancient as the common law in the places where these customs prevail. It is true, where a custom of a publick nature is alleged in a particular vill or place, it must be shewed that it is an ancient vill; as, where a man claimed lands on the south side of a vill, setting forth that they were time out of mind devisable, and so derived a title to himself by a feoffment from the last devisee, this was held void, because, it being a custom against common-law, he ought to have set forth that the vill was an ancient vill; but, if he had alleged such a custom in a *borough*, which *ex vi termini* imports a place of antiquity, it had been good. Now in this case it is alleged, that the parish of *Huntspill* is an ancient parish, and then the custom is set forth, which is agreeable to the authority before mentioned. And if the custom be not contrary to reason and justice, the judges never inquire into the commencement of it. No man can say, that this custom is unreasonable, because it goes only in discharge of a single duty: now all the books which condemn prescriptions *in non decimando*, either in a county or in a parish, are where they are made generally of all tithes; but they are seldom denied for a particular thing, as in this case. And therefore a custom to pass in a ferry-boat toll-free has been adjudged good, though it is far more unreasonable than this; because it is only a discharge to the person claiming it, and may be a charge to another. So, there are many things which are not tithable of common right, as fish taken in the sea, rabbits and pigeons spent in the house, &c. and yet by custom tithes of those things have been paid to the parson; if therefore it be a reasonable custom for the clergy to charge the laity with tithes of such things as of common right ought not to be chargeable, it is as reasonable that a layman may discharge himself by a custom in a place where none have been usually paid. Such
a custom

40 Aff. pl.
27. 21 E. 4.
54. a.

Cro. Car.
264. 1 Ro.
Abr. 654.

a custom (as has been observed) is not good in a parish ; not because it is inconsistent with the law ; the reason is, a single person or parish is not capable of such a custom. Besides, the law requires that the parishioners should shew what recompence the parson has in lieu of his tithes, by which it may appear that the custom had a reasonable commencement ; but no such thing is required of a whole county, because it cannot with any shadow of reason be pretended, that all the inhabitants could or can conspire to defraud their respective parsons. But there are books which allow a custom or usage to be good in places of as large extent, which customs will not bind when alleged in a vill ; as, in a *cessavit per biennium*, the lord shewed the custom of the place to be, that where the tenant did not pay his services in two years, he might enter and hold the lands till he was satisfied of the arrears : this was held to be void, because the usage was alleged in a particular vill only, and it was not shewed that it was customary so to do in the vills round about. But a custom in a hundred in *Kent*, that if any one be charged to have gotten children in adultery, and cannot acquit himself by law, that then he shall forfeit all his goods to the king, was held a good custom. So, a custom in a hundred, that if a waif or estray be eloigned, and it is presented that it came to the possession of any dwelling within the hundred, the lord may distrain till he make restitution. So, a custom that an infant of the age of fifteen years may make a feoffment, and sell his lands ; all these are against common law ; but being used in a hundred or county, are thereby become the laws of the places where they obtain. But to come nearer to the case, it will not be denied that a custom alleged in a parish, for all underwood to be discharged of tithes which is used in that parish for fencing corn, is good, but then you must shew that the tithe of that corn is paid to the rector ; but it may be alleged in a county, weald, or country, without any consideration at all. And therefore *Brooke* in his *Abridgement*, referring to the author of *Doctor and Student*, says, that a man cannot prescribe in a vill to be discharged of tithes, because it is too particular ; but such a prescription is good in a whole county or hundred, because it is the custom of the place. It has been objected, that a custom *in non decimando* may be good in a county, but not in a hundred, because of the uncertainty of its extent : sure that is a reason of very little force, for the limits of a county are altogether as uncertain as those of a hundred ; but a hundred is a known precinct, and

43 E. 3. 32.
pl. 30.

1 Ro. Abr.
562.

44 E. 3. 19.
pl. 14.
21 E. 4. 24.

1 Saund.
141.

Tit. Dismes,
pl. 14. Mar.
25. 1 Ro.
Rep. 22.

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and not barely a liberty, as has been said, though there may be many liberties therein ; for when granted to a subject it is a liberty, but when it remains part of the county it is otherwise ; and therefore in an avowry a man may prescribe by a *que estate* to have a leet in a hundred ; but, if a *quo warranto* be brought against the hundred, he must then set forth his title. Besides, if the words " province" and " county" are synonymous, a county and hundred are so too ; and that in the meaning of the law, as may plainly appear ; for all issues are to be tried by jurors of *the county*, that is, by jurors of *the hundred* ; for it was a good challenge at the common law if there were no hundredors of the jury. In the statute of *Winton* these words are used promiscuously ; it appoints, " that inquests of felonies and robberies shall be taken in towns, " hundreds, franchises, and counties, so that the offender may be " attainted ; and if the county will not answer for him, then it " shall be answerable for the robbery done, so that the whole hundred where the robbery is committed shall be liable." Such a custom in a hundred has never yet been condemned, for it never came in judgement but in the case for tithe-wood, and there it was held to be a good custom, even in a whole *weald* ; and what reason can be given why it should not be good in a *hundred* as well as in a *weald*, which is as ancient as the other, especially when it cannot be denied but such discharge might begin by composition ? It is objected, that *tithe-wood* is not due of common right, as all other tithes are, and therefore a custom *in non decimando* for wood in a hundred may be good. But tithe-wood is due of common right ; if not, to what purpose was the statute *de sylva cædua* made ? It was to ascertain what wood should pay tithes, and what should be exempted ; and why did the nobility and commons prefer several petitions to the king, after the making of that statute, that it might be explained what was meant by *sylva cædua*, if no tithes were due for wood ? which is an admission that tithes had been paid for it before that act. Agreeable to this is the common way of demanding tithes for wood at this time ; for the libel is always general, which shews that the party has a right to demand ; for if he had not, then he must allege a custom, and yet prohibitions are never granted upon such general libels. Suggestions are also made always in the affirmative ; but, if they were due by custom, and not of right, then they ought to be in the negative, *viz.* to deny that there is any such custom.

Second

2 H. 4. c. 6.

21 H. 4. c. 2.

23 E. 1. c. 2.

1 Ro. Abr.

638-9.

2 Inst. 643.

Second point. Then as to the objection, that it does not appear that the parson has a sufficient maintenance left, the pleading seems to be otherwise; for there are several *moduses* set forth for tithes yearly arising in the parish, which may give him a convenient maintenance every year; and if he has a sufficient provision by any one *modus*, it is not material by whom he receives it.

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Curia. It will be difficult to shew a *non decimando* for any tithes besides those of wood; for all the cases which incline to such a custom, are put generally, *viz.* that a county or a hundred may thus prescribe, but they do not mention what tithes are in question. Now if tithes of wood had been due of common right, to what purpose was that canon made by *Archbishop Stratford*, in the seventeenth year of *Edward the Third*, that tithes of *sykva cædua* shall be paid? against which canon there was a petition made to the parliament in that very year, reciting the ancient usage to be, that tithes should not be paid for wood; and the petition was answered, that a prohibition should be granted against the canon, where tithes of wood have not been accustomed to be paid. It is true, the ecclesiastical courts do hold, that tithes are due of common right for every thing, nay, even for stones or gravel digged out of pits, but the common law is otherwise; for tithes of common right are due only for such things as arise by annual profits: now, though trees are renewing yearly, yet they yield no annual profit, and therefore tithes are not paid for them. Therefore where tithes are paid for things which do not arise by such means, they must be due by custom. But such a custom *in non decimando* cannot be good (o).

Vide supra.

And therefore a consultation was granted (p).

(o) Agistment tithe, say the court, according to lord *Raymond* and *Salkeld*, is due of common right; because the grass which is eaten is *de jure* tithable, and must have paid tithe, if cut at perfection.

(p) Lord *Raymond* reports, that the court not only arrested the judgement, but caused this entry to be made, *Quia apparet curiæ domini regis, &c. quod customa prædicta, &c. nullius est vigoris, ideo consultatio, &c.*

P. 8 W. III. A. D. 1696. Dom. Proc.

Sandys v. Eastmond. [Show. P. C. 192.]

Agiltment
tithe of
herbage, to
be paid for
oxen and
unprofitable
cattle, as
well not
used as used
for the
plough, for
the time
they are
grazed and
fatted for
sale, after
turned off
from the
plough.

THE parish of *Yevilton*, consisting much in pasture land, and the plaintiff having been rector thereof for twenty years last past, and upwards, and being entitled to the great and small tithes, and all other dues, within the said rectory, he exhibited his bill in the court of exchequer against the defendant *Joseph Eastmond*, in his own right, and as executor of *Henry* his father, and against the other defendant, *Samuel Nayle*, for agiltment tithes, for depasturing and fattening their oxen, and other unprofitable cattle, within the said rectory, from the year 1677, to the time of exhibiting his bill, which was in *Michaelmas Term* 1692.

The defendant *Joseph Eastmond*, by his answer, admitted, that he had assets sufficient to answer the plaintiff's demands; and both of the defendants admitted, that they and the testator had fatted and depastured divers oxen yearly upon their lands in the said parish, but said, that some of them were first used at the plough, and afterwards fatted, when turned off from the plough.

The court of *exchequer* thereupon, viz. *May* 26, 1696, decreed tithe herbage to be paid for the defendants and the testator's oxen and unprofitable cattle, not used for the plough, and also for their oxen and unprofitable cattle, used for the plough, for and during the time they were grazed and fatted in the parish for sale, after they were turned off from the plough. From which decree there was an appeal to the house of lords.

It was insisted on, in support of the appeal, that the decree was unjust; and some texts of scripture were quoted about muzzling the ox, &c. and also it was urged, that that part of the decree concerning oxen once used at the plough, was erroneous; and there were cited all the cases in the books for exemption of plough-cattle from tithe herbage, and that this was double tithing. And it was insisted on, that the reason of the thing was against it in this case, because the agiltment of these cattle was necessary to sustain that labour, which promoted the gain of which tithe was paid; that this privilege extended to all such oxen, as ever had been used at the plough; that the exemption did continue, after they were forborne to be used at the plough; for there was the same reason to continue the exemption afterwards, as there could be to allow it, during the interval, when

when they did not draw the plough. And these and other reasons urged, it was prayed, that the decree for tithe, *as to* such cattle as ever had been used with the plough, should be reversed.

1696.

On the other side it was urged, that the decree is agreeable to the law, and supported by many resolutions in the court of *exchequer*; that there was a reason for tithe in this case, because these cattle, though formerly used at the plough, ceased now to belong to it, and, consequently, tithes became due; that there is a difference in the nature of the thing; for when the cattle feed in order to labour, the parson hath a tenth of the benefit produced thereby; but when they are fatted only for sale, it is otherwise. That this was a settled and allowed difference in the *exchequer*; that while the oxen are working, no tithe shall be paid for their feeding, because there are tithes of other things arising by the labour of such cattle; but, when they do no work, and are turned off to be fatted, and are grazed, there, tithes shall be paid for the herbage which they eat, they being no way beneficial to the parson in any other tithes. And many cases in the *exchequer* were cited to warrant this distinction; and it was said, that none could be alleged to the contrary; wherefore it was prayed, that the decree might be affirmed; and it was affirmed.

Tr. 8 W. III. A. D. 1696. Scac.

Medly v. Talmy. [MSS.]

BILL for tithes generally.—Defendant states, that in 1652 his father purchased the lands whereof the tithes are claimed, and by the purchase deed they are mentioned to be tithe free, and are conveyed as such: that defendant is owner and occupier of the said lands, which contain 80 acres, and are of only 30 l. a year value: that all the said lands are and will appear to be free, and by lawful means discharged from the payment of tithes of corn and grain, and other predial tithes, or any customary rate in lieu thereof: that the ancient deeds relating to the said estate are lost or mislaid, so that he cannot particularly set forth by what ways or means the said lands are exempt or discharged from tithes: he discovers quantities and values. Upon long debate of the matter, the court did not think fit to decree for the plaintiff without a trial at law, but proposed that he should bring his action on the statute (q); which the plaintiff declining, the bill was, by his consent, dismissed without prejudice and without costs.

Where lands have been conveyed as tithe-free, and there is no memorial of any payment of tithes for them, the court will not pronounce a decree for the parson, until his right has been ascertained at law, though the reason of the exemption cannot be traced.

(q) Qu. Whether an ejectment should not rather have been directed?

1697.

M. 8 W. III. A. D. 1697. Scac.

Poole v. Draper and Osborne. [Dodd's MSS. Rayn. 83.]

Costs in a cause against several defendants, though they defend severally, will not be separated.

IN a bill for tithes against two, the defendants make two separate defences, and decree against them both, with 90 l. costs taxed. It was moved, that the costs might be separated, being several causes in effect, and different dues decreed; and so said to be done, 25th November 1693, in the case of *Lifter v. Captain*, but the court would not now do it.

H. 9 W. III. A. D. 1697.

Layfield v. Enticknapp. [Decree-Book, 3d Feb.]

A custom to pay 3d. for every lamb yeaned and sold before St. Mark's Day, and to pay tithes in kind for so many as were not sold before that day, is bad.

THE rector of *Chiddinfold*, in the county of *Surry*, claimed tithes of sheep and lambs.

The defendant insisted on a custom to pay three-pence a piece for all lambs yeaned and fallen before the feast of St. Mark that were sold before the said feast-day, and to pay tithe in kind for such as were not sold before that day: but in case there were but seven, then to pay the seventh; but where there were under seven, then to pay three-pence a piece.

The cause was heard on the 18th of November last, and an issue directed to try the custom; but the plaintiff, being unwilling to try the same, moved, on the 30th of November, for a rehearing, which came on this day; when the court unanimously agreed, that the said custom was not a good one, and that there ought to be no trial at law.

Tr. 9 W. III. A. D. 1698. Scac.

Harris v. Adge. [Dodd's MSS. Rayn. 84.]

Where tithe has been paid, court will presume the reading of the articles.

THE court presumed, that the plaintiff had read the articles, where tithe had been paid; though this was the defendant's defence.

Tr. 9 W. III. A. D. 1696. B. R.

Morton v. Briggs(r). [2 Lutw. 1037.]

IN prohibition, issues were taken on several prescriptions, all of which, but one, were found for the plaintiff. But, as to the following prescription, that every tenant within the parish of *Kirkeburton* hath paid to the vicar thereof 1½ d. for every cow having a calf up to the number of five cows, for five cows having calves 1 s. 4 d., for six cows having calves 2 s. 6 d. for ten cows having calves 2 s. 8 d., for every cow having no calf 1 d., and for every milch cow 1 d., in satisfaction of all the tithes of cows, calves, and herbage and pasture of their lands within the said parish; it was moved, in arrest of judgement, that this prescription was void, because the payment of those several sums of money for the tithes of cows and calves, cannot be any satisfaction for the tithes of the herbage and pasture of the lands. And for this the following cases were cited, viz. *Gryfman v. Lewes*, Cro. Eliz. 446. and *supra* 165. *Monday v. Lovice*, Moor 454. *Beard v. Adams*, id. 278. and so are 1 Keb. 716. case 44. 2 Keb. 2. *Hutchinson and Atkinson's case*, and 212. *Brown v. Haywood*.

A customary payment for the tithes of one thing will not discharge the tithes of another thing.

Another exception was taken to this prescription, for that it is to pay 1½ d. to the vicar for every cow having a calf, for five cows having calves 1 s. 4 d., for six cows having calves 2 s. 6 d., and for ten cows having calves 2 s. 8 d.; but it is not alleged, that any thing has been paid when the number of cows exceeds six, but is under ten, or when the number exceeds ten. And this exception was holden good; and a consultation was awarded, not only as to the tithes of herbage and pasturage, but also as to those of cows and calves. *Lutwyche* was of counsel with the defendant.

A custom to pay different sums for five cows having calves, six cows having calves, and ten cows having calves, in satisfaction of all the tithes of cows and calves, is void, because no

payment for any intermediate number between six and ten, nor when the number exceeds ten.

(r) In this case, (according to Lord Raymond 242.), *Treby C. J.* said, that tithes are not payable for aftermowth *de jure*, and therefore it is but form to lay a custom to be discharged of tithes of aftermowth, in consideration of making the former mowing into hay; for tithes are payable only of things *semel in anno renovantium*. See contra, 1 Ro. Abr. 640. pl. 11. Parson of *Stanfield's case*.

1698.

M. 9 W. III. A. D. 1698. Scac.

Anon. [1 Freem. 334.]

IN a cause, where a parson preferred a bill for tithes, these points were held by the judges :

No tithes of hop-poles, or of their bark.—So, as to hop-poles, *White v. Bickerstaffe*, M. 15 J2. C. P. God. Rep. Can. 414.

Tithe of fuel no dry hops.

How soon tithes should be paid. Corn and hay.

When no tithe shall be paid for wood to fence corn. No tithe for any thing that increases tithes.

Quere, whether tithe for fuel spent in the house, where there is no custom.

What sort of barren land is exempted from tithe. Woodland turned to tillage, is not barren land. In what case tithe is payable for rakings of corn (1). Parson cannot set out tithe himself, without consent. 2 & 3 E. 6. c. 13.

1. Where the parson had tithe hops, no tithes should be paid for the poles, which were used in the hop-yard; and a question arose, whether the parson should have tithes of the bark of the poles, the bark being sold? and by *Letchmere*, he should; but the *chief baron*, and the other *barons e contra*; for the poles being privileged, the bark shall be so too.

Hughes's Abr. 689. But in the latter book there is *Qu.* as to this case.

2. That for fuel spent in fire to dry hops, tithes should be paid; because the parson had no benefit by that, the tithes being paid before they were dried.

3. That tithes ought to be paid, as soon as the tenth part can be well severed from the nine, if there be no custom to the contrary; and so it is for corn and hay, as soon as it is made into shocks or cocks.

4. That for wood employed to hedge or fence corn, where the parson had tithe corn, no tithe shall be paid; and it was said to be a general rule, that no tithes shall be paid for any thing, *whereby the tithes are increased*.

5. Whether tithes shall be paid for fuel spent in the house, where there is no custom, they said they should not determine, it being no point in this case, and there being opinions both ways. *Cro. Car.* 113. pl. 5. was cited at the bar, that such fuel shall not be discharged without a custom.

6. That land where wood grew, and was stocked up, and converted into tillage, is not such barren land as ought to be exempted from payment of tithe; but only such is intended barren land, as before the ploughing, produces no profit to the owner.

7. That for rakings of corn, no tithe was payable, if they were involuntary; but, if there was any fraud in leaving more than was necessary, that tithe should be paid.

8. That the parson could not justify his coming to set out tithes without the consent of the owner; because, by stat. 2 & 3 E. 6. c. 13 the owner is to set out his tithe; and if he do not, he is liable to the penalty of the statute.

(1) In the case of *Grant v. Hunt*, M. 41 & 42 Eliz. B. R. in Prohibition, it was adjudged, that the custom of the realm no tithes are due for the rakings of corn. *Moort* 278.

M. 10 W. III. A. D. 1698. Scac.

Gee v. Peach. [Decree-Book, 17th Nov.]

THE plaintiff, as farmer of the rectory and parsonage of *Orpington*, in the county of *Kent*, stated, that the defendant had, for five years last past, been occupier of a great farm, consisting of arable land, hop-grounds, wood, and underwoods, which he had ploughed and sown with grain of all sorts, and planted with hops, and from which he had felled divers acres of underwood, alder trees, and ash trees, under 20 years growth, and had barked and flawed great quantities of bark from the said trees, and had paid no tithes for the same.

A customary payment in discharge of the tithe of hops is void. Hop-poles, and their bark tithe-able. *Qu.* Woodland grubbed not protected by the statute of 2 & 3 E. 6.

The defendant said, that the tithes of hops or wood belonged to the vicar; that he had several times peeled, barked, and flawed several alder trees for hop-poles, but that the bark was of small profit; that as to hops, there was *a modus* to pay 10 s. an acre in lieu of the tithes thereof; that tithes of the toppings of the timber trees were not due, nor for the slackwood used in his family; that he had grubbed several quantities of woodland which he had sown with corn, and also several roods of barren ground which yielded no profit, and had sowed the same with peas; and that no tithes ought to be paid for such lands by the statute 2 & 3 E. 6. c. 13. s. 5. for seven years.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides.

The court declared, that the custom of paying 10 s. an acre for the tithe of hops is a void custom and not warranted by law; and therefore decreed, that the defendant ought to account for the same, according to the value of the tenth part of the said hops, when the same were pulled from the bine or stem, at which time the tenth part is severable from the nine parts, and the tithes by law payable. That the reason assigned for the non-payment of tithes of corn sowed upon grubbed ground, is no good discharge, but that tithes in kind, or some composition, ought to be paid to the plaintiff for the same. That tithes ought to be paid for the hop-poles growing upon the premises, which he used in poling his hops. That the tithes of the bark of the alder-poles and hurdle-rods and of woad or woold, as offered by the answer, are to be paid in kind, and delivered by the defendant upon the plaintiff sending for them.

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It is ordered by the court, that the said defendant shall and do forthwith pay to the said plaintiff the sum of 10 l. in full of his tithes of hops, hurdle rods, bark of alder trees, cords of wood and peas, and in full discharge of the sum of 11 l. 7 s. 3 d. reported due (t).

Tr. 11 W. III. A. D. 1700. Scac.

Hunt v. Codrington and others. [Decree-Book, 26th June.]

Teazels,
having been
first planted
in gardens,
are a *small*
tithe.
1 Wood's
Decr. 391.

THE bill stated, that the plaintiff, as lessee under the *Dean and Chapter of Wells*, had for several years rented the rectory or parsonage of *Congresbury*, in the county of *Somerset*, and was entitled to all tithes, and particularly to the tithes of *teazels*, sown or planted within the said rectory; that, time out of mind, the tithes of *teazels* had been paid to the owners or farmers of the said parsonage, but that the defendant *Codrington*, being vicar of the said parish, pretends some right to the tithes thereof, and has forbidden the parishioners to pay the said plaintiff the tithes, and has received and taken the tithes thereof; that the other defendants had, in the years 1696 and 1697, a great quantity of *teazels*, but they pretend that the same are small tithes, and so belong to the vicar, and not to the impropiator.

Three of the defendants answered, and admitted the plaintiff to be farmer of the rectory, and entitled to all tithes belonging thereto, but denied his right to the tithes of *teazels*.

The defendant *Codrington* said, that he had for several years claimed the tithes of *teazels*, as vicar of the said parish, for that they are small tithes, and that the vicarage is endowed with all small tithes.

The defendants *Boucher* and *Wollin* said, they had *teazels* in the said years, and they set forth the quantities and values, and insisted that the tithes belonged to the defendant *Codrington*.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and on reading the proofs in the cause; and also a copy of an endowment of the vicarage, whereby it appeared that the said vicarage is endowed with all small tithes, and that the vicar has been paid all small tithes; the court took

(t) It does not appear from the bill, answer, or decree, that the tithes of the hop-poles themselves were demanded.

time to consider of the matter, and having so done, they this day declared, that the tithes of *teazels* belong to the defendant *Codrington*, as vicar of the vicarage, they being first planted in the parish in gardens (*u*).

It is thereupon ordered by the court, that the said bill be dismissed, with costs to be taxed; but that the said defendants are not to prosecute the plaintiff for the same until this court make further order therein.

H. 12 W. III. A. D. 1700. Scac.

Trewin v. Bond. [Decree-Book, 20th Feb.]

THE plaintiff claimed the tithes of corn and other grain as lessee of the rectory of *Woodbury*, in the county of *Devon*, from and under the cultus and college of vicars of the choir of the cathedral church of *St. Peter*, in *Exeter*.

A custom to set out the tithe of corn in sticks of 12 sheaves, or stiches of 10 sheaves, and to pay no tithes for the odd number of sheaves under ten, is void.

The defendants insisted on an immemorial custom to set up their corn and grain there grown and reaped, in sticks, being 12 sheaves placed in a row, six sheaves against six sheaves; or in stiches, being 10 sheaves placed in a row, five sheaves against five sheaves; and that if there happen, upon the whole quantity of corn, to be any stick or sticks, stich or stiches, not amounting to the number of 10, no tithe is paid of such under the number of 10.

The court declared, that the said pretended custom is a void custom; and therefore ordered, that the defendants shall pay to the plaintiff the tithes of all the wheat, barley, and other corn; particularly for the tenth part of all the odd sticks or stiches of wheat, barley, or other corn, not amounting to the number of 10, which they respectively had in every field or inclosure within the said parish.

(*u*) Teazel is a plant used by clothiers: it appeared in the evidence, that it had been first planted in the parish of *Congresbury* about fifty years before the filing of the bill, and that it had been planted in other parishes immemorially; that the tithe of it, during the said fifty years, had been uninterruptedly paid to the impropriator; and that four successive vicars had quietly acquiesced in such payments; but, as the vicar was endowed with all the *small tithes* of this parish, and the plant was, in the opinion of the court, clearly a small tithe, the bill was dismissed. S. C. Rayn. 94.

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Tr. 12 W. III. A. D. 1700. Scac.

Staughton and others v. Hide and another. [Decree-Book, June 27.]

A custom that after grass is put into cocks, the owner is not to rake together the grass round the cocks, is void.

THE bill stated, that the plaintiffs *Staughton* and *Morris* were proprietors, trustees, and farmers of the rectory or parsonage impropriate of *Shinfield*, in the county of *Berks*, and entitled to the tithes of corn, grain, hay, withies, osiers, and the other tithes and dues belonging to the said rectory, in trust for the plaintiff *Mary Jones*.

The defendants said, that after the grass is put into cocks, it is the custom of the said parish, that the parishioners are not to rake together the grass round the said cocks.

The court declared, that the custom, insisted upon by the defendants, not to rake up their grass into cocks in order to setting out the full tithes thereof, is a void custom, and that the defendant ought to account for the tithes of the said hay, and also for the tithes and duties demanded by the bill.

M. 12 W. III. A. D. 1700. B. R.

Brown v. Mugg. [Ld. Holt's Rep. MSS (x).]

A chaplain extraordinary to the king is not, as such, entitled to hold two benefices above value.
2 Salk. 161.
S. C. 2 Ld. Raym. 791.
S. C.

EJECTIONE firmæ for lands, in *Stockton* in the county of *Warwick*, upon the demise of *Samuel Hill* clerk. Upon not guilty pleaded, there was a special verdict, which finds the statute of 21 H. 8. c. 13. whereby it was enacted, that "if any person or persons having one benefice with cure of souls, being of the yearly value of 8 l. or above, accept and take any other with cure of souls, and be instituted and inducted in possession of the same, that then and immediately after such possession had thereof, the first benefice shall be adjudged to be void; and that it should be lawful to every patron having the advowson thereof to present another, and the presentee to have the benefit of the same in such like manner, as though the incumbent had died or resigned, any licence, union, or other dispensation, to the contrary thereof obtained notwithstanding." And further, it is provided in that

(x) This argument of my Lord *Holt* is extracted from the manuscript of his own Reports in the collection of the Earl of *Hardwicke*.

statute, "That it should be lawful for every spiritual person or persons, being chaplains to the king, to whom it shall please his highness to give any benefices or promotions spiritual, to what number soever it be, to accept and take the same without incurring the danger, penalty, and forfeiture in this act comprized."

That the vicarage of the church of *Inkbro'* in the county of *Worcester*, was a benefice with cure of souls, and of the value of 8 l. *per annum* and more, so rated and taxed in the king's books; and the defendant *Henry Mugg*, the 1st of *November* 1664, was presented to the vicarage, and soon after instituted and inducted thereunto; and afterwards, 24th *April* 1673, the defendant *Henry Mugg* did accept another benefice with cure of souls, viz. the church of *Stockton*, and was thereto presented by *Robert Martin* esq. being then the rightful patron, and was afterwards instituted and inducted thereunto, which was also a benefice with cure of souls of the value of 8 l. *per annum* and more. That *Henry Mugg*, 1st *July* 1675, being a spiritual person, was made chaplain extraordinary to king *Charles* the second: the words are, *legitimè constitutus capellanus extraordinarius*; and continued so during the life of the said king. On the 3d of *February* 1675, he was presented to the vicarage of *Inkbro'*, then vacant by cession, by king *Charles* the second, then the undoubted patron of that turn by lapse of time, to corroborate the title of the defendant to that vicarage, and was instituted and inducted thereupon. That *Samuel Hill*, the plaintiff's lessor, was presented to the church of *Stockton* by the late king *William* the third, 3d *August* 1695, and in the same month was instituted and inducted thereunto. That the lands in question belong to the rectory of *Stockton*.

The case, in short, was this: that *Mr. Mugg* was presented to the vicarage of *Inkborough*, instituted and inducted, which was above the value of 8 l. *per annum* in the king's books; and after that was presented, instituted, and inducted to this living of *Stockton*, being likewise above value, whereby *Inkborough* became void by cession, by virtue of 21 *H. 8.*; and being so void, he was made a chaplain extraordinary to the king, and then obtains a presentation from the king by lapse to *Inkborough ad corroborandum titulum* thereunto, the king having then a good title to present by lapse, and is instituted and inducted thereupon. After several years the king did present the lessor of the plaintiff *Mr. Hill*.

In this case there are three things to be considered: 1st, Whether the defendant *Mugg* by being retained and admitted to be the king's

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chaplain extraordinary, be thereby qualified to have a plurality of benefices within the 29th sect. of 21 H. 8.?

2dly, Supposing his being a chaplain extraordinary to the king to be a sufficient qualification, yet, whether there ought not to be a dispensation to enable the defendant to hold a plurality?

3dly, Supposing a dispensation to be requisite, it will then remain further to be considered, of what consequence that will be to the plaintiff's lessor, *Samuel Hill*, who is the king's clerk presented by lapse, and instituted and inducted thereupon.

Before I begin to discuss these particular points, it will be necessary to consider and to clear the case of two other matters that arise in it; which will serve to make the principal case more entire, and let us into a more distinct consideration of them. 1st, What effect the king's presentation of the defendant *Mugg* to *Inkborough* hath, being *ad corroborandum titulum*. 2d, Whether, when the king's chaplain duly qualified be presented by a common patron to a living above value, the king by virtue of his prerogative may present him to other benefices of his own gift without avoiding the first by his being instituted and inducted to the second. These two have been stirred at the bar.

1st, Concerning these preliminaries, I do hold, that the presentation of the king *ad corroborandum titulum* is good, and institution and induction thereupon will make a plenary. The defendant *Mugg* being vicar of *Inkborough*, and afterwards without either qualification or dispensation accepting *Stockton*, and being thereunto inducted, the vicarage of *Inkborough* became void by cession by the express words and intent of 21 H. 8. being of the value of 8l. per annum. Being so void, the patron ought to present within six months, otherwise lapse will incur upon him. And it appears, not only that the right to present by lapse was devolved upon the king, but also that *Mugg* had the possession of *Inkborough*. Though not lawful incumbent, yet having an actual possession, and having a colour to keep it until evicted, a presentation to that vicarage is proper, and if he be instituted and inducted, he will be made a perfect incumbent to fill the church, which before was vacant by cession. This is the true use of a presentation *ad corroborandum titulum*, for there is no other; for if the church is full by presentation of a usurper upon the king, a presentation *ad corroborandum titulum* is void, there being no room for it to take place until the usurper's clerk be removed by judgement in a *quare impedit*. But in that case, if it be the king's pleasure that the usurper's incumbent

bent should enjoy it, the king by patent under the great seal may confirm it. *Yelv. 91. The King v. Matthew*, by the opinion of *Popham*, which also I have known put in practice. And if it be a presentation *ad corroborandum titulum* of the usurper's clerk being in possession, though there be an institution and induction upon the usurper's presentation, it is of no use. Now there was no other means to make a title to *Mugg* to *Inkborough* but by a new presentation; and being mentioned *ad corroborandum titulum*, it shews that the king's intent was, that notwithstanding any defect of the title, yet he should be vicar there. The king presents, taking notice of his title, which title is true, *viz.* that he was patron of that turn to present by lapse. Then it follows, that *Mugg*, notwithstanding he endeavoured to avoid his last presentation to *Inkborough* in order to defeat the lessor of the plaintiff's title to *Stockton*, yet, being instituted and inducted to *Inkborough* upon that presentation, his living of *Stockton* is void by cession, if he hath not a qualification sufficient to prevent it, which in time shall be considered.

2d, The second preliminary point is, whether, when the king's chaplain is presented by a common person to a benefice above value, he may accept more benefices of the king's gift, without making a cession of the first, *viz.* whether by this clause the whole that makes the plurality ought not to be of the king's gift. I conceive not. The words of the statute are, that it shall be lawful for every spiritual person being chaplain to the king, to whom it shall please his highness to give any benefices or promotion, to what number soever it be, to accept the same, without incurring the danger, penalty, and forfeiture in the act comprized.

Now as to the first benefice, the king's chaplain is not beholding to the act; but he may accept it of a common person as well as of the king: but the act makes the chaplain capable of a plurality, so that those benefices, which are and make the plurality, be of the king's gift. Now if the king's chaplain hath a benefice of the presentation of a common patron, and he afterwards accepts of one or more from the king, if he forfeit the first, he incurs the penalty and forfeiture of the statute, which by the express words of the clause he is exempted from. This very question came in debate in the case of *Whetstone v. Hickford*, *Sav. 135.* *Queen Elizabeth*, before her accession to the crown, presented *Young* to the church of *Cranfield*, of which she was patroness: and the crown being descended upon her, she retains *Young* to be her chaplain, and then presents him to *Stoke Brewer*, both benefices being of the value of 8 l. *per annum.*

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annum. It was held, that he being presented by the queen before her accession to the crown, was all one as if he had been presented by a common patron, for at that time the queen was no other; but, notwithstanding that, the queen might present him to *Stoke Brewer*; and though no dispensation did appear, yet the first, which was *Cranfield*, was not void by this act.

I have now done with these previous questions, which I thought it might be convenient to discharge the case of, to the end we might not be troubled with any thing of them in the debate of the others. And as to the first point, we are of opinion, that the defendant *Mugg* being made a chaplain extraordinary is not thereby qualified to take a plurality from the king within the meaning of the statute. A chaplain extraordinary is not within the meaning of the statute, nor strictly within the words, as it is described and found under the denomination of being "extraordinary." As to the meaning of the statute in giving this privilege to divers of the clergy under particular qualifications, a preeminence was designed to those that were in the king's service, and to enable the king, out of his own stock of advowsons, to bestow benefits upon them for such their service and attendance upon the king, and to encourage them in a diligent performance of those services by the hopes they had of obtaining a reward from the crown. We are to suppose when a law is made, that it is for some good and just reason, though the reason be not expressed, as it is in the preamble of this statute, which was primarily and intentionally made against non-residence, which was a scandalous breach of duty in the parson or vicar that had cure of souls, that tended to the loss and miscarriage of many persons. To prevent which the act designed to take away the causes, which were two. The one was, that the parsons became farmers: the other was, the taking of pluralities. The preamble gives the reason of that act, "for the more quiet and "virtuous increase and maintenance of divine service, the preaching "and teaching the word of God with godly and good example giving, the better discharge of curates, maintenance of hospitality, "the relief of poor people, the increase of devotion, and the good "opinion of the laity towards spiritual persons." So the statute prohibits spiritual persons from taking any farms, which was a great mischief, that took up the clergy's time, and was an impediment to them in discharge of their spiritual function. So were pluralities, to which the clergy had been so used, and which were to them so beneficial, that the retrenching of them went to their hearts.

Though

Though their enjoyment of them was contrary to the laudable canons of the church, yet by virtue of dispensations from the pope, for their own advantage, they could think themselves discharged as well from the moral as the legal obligation of those canons. Which corruption being so inveterate, (it appears as well from the nature of the thing as the manner of penning the act), that it could not be so soon cured as was wished for, so great clogs were put to so desired a reformation, the chaplains of the king, and of divers noblemen and great officers are thereby exempted from the severity of being deprived of an indulgence which they had so long enjoyed.

1st, An indulgence was given to the king's chaplains to purchase a licence to have two benefices. 2dly, The chaplains of noblemen and great officers to have two. 3dly, For the king of his own gift to bestow as many as he would upon his own chaplains, who being made capable of so large a plurality, must have it for some consideration relating to the king that at least has the semblance of being meritorious. Those who are extraordinary chaplains are not within that reason, for they are not bound to any service or attendance: they are supernumeraries, not within the establishment of the king's household; no business for them; no entertainment for them; the king allows them, as such, not a bit of meat; and yet these men hope to swallow the king's fat benefices. It is contrary to the rules or reason of justice, that those who are bound to no attendance, and do no service, should be in equal degree with those who perform it. 2dly, A chaplain extraordinary is not within the words of the act. For when the act says the king's chaplains may take from the king a plurality of benefices, it must in common understanding be understood by the indefiniteness of the expression, such as are complete and perfect chaplains. A chaplain extraordinary is not so; for it imports a defect; for he wants the essential part of the chaplain, viz. the office and employment. Nay, he is excluded from the exercise of it as much as a mere stranger. But some will say, that we cannot take notice of the difference as it is found; it being found that the defendant is the king's chaplain, that is sufficient, and the adding of the word "extraordinary" is a specific difference of which we cannot take any notice, unless it were explained to us. I answer, that if he had been found to have been the king's chaplain generally, it would have been sufficient, for that would have imported that he had *officium*, and therefore he ought to have *beneficium*. But when found to be extraordinary, that cannot be understood a specific difference, but an addition that

qualifies

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qualifies and lessens the extent of the character. And we may interpret the word "extraordinary" as it must be applied to the qualification of the office, and not to denote any excellency in the person; to be understood one that is irregular or out of due course and order; or rather contrary to order or fashion. All constructions ought to be made according to the common and usual sense of the words, and we ought never to interpret beyond the words, unless the thing out of the words be not within the reason of the thing provided for. And so hath the exposition of this statute always been limited. As 4 Rep. 89, *Drury's case*. A baroness dowager retains two chaplains, which is the number the statute allows her: she then retains a third: one of the two dies before either of the other has had any plurality: this third chaplain is a chaplain within the words of the statute, and the baroness dowager hath but two; yet is the third not qualified to be dispensed with to take a plurality. Why? because at the time of the retainer he was an extraordinary chaplain; and though he comes after to be within the compass of the statute, yet there must be a new retainer to qualify him after the death of one of the two. With which agrees *Cro. Eliz.* 723. 839. This admitting of extraordinary chaplains is a prejudice to the right of the chaplains in ordinary. By this statute the chaplains in ordinary have a right vested in them; if more are permitted to partake with them, it must be an infringement of that right. That it is a right is most plain, a privilege and an emolument annexed to their offices as chaplains. It is not to be understood such a privilege for the infringement whereof an action lies, as if it were a fair or a market: but it is an infringement of a privilege the statute designed to give to the king's chaplains that serve him, and therefore ought not to be extended to those who do not serve him. But it is objected, such a construction is to confine the king to the number of 48 chaplains. I answer, No, it is not to restrain the king, but it is to restrain my lord chamberlain, who hath by virtue of his office the disposing of the chaplains' places. But that must be understood according to the rules and establishment of the king's household; and therefore he cannot make places, or increase the number, but the king may, if he pleases, from 48 to 100, and more, and then all those 100 or more will be chaplains, not extraordinary, but in ordinary. This chaplainship is like to other offices and places that are at court. The gentlemen of the privy chamber are confined to a certain number, yet there be more extraordinary. The clerks of the council

to four, yet there be more admitted to attend as extraordinary, who are not clerks, but have a licence to attend in order to learn, and thereby they are candidates upon an avoidance. It is objected, that it will be a hard treatment of the king's chaplains to disallow them, because they do not attend the king's service, when the chaplains of noblemen, and other officers, that are allowed their complement of chaplains, shall have their benefit of a qualification, though they never attend or do any service. I answer, it is most true, that the chaplains of noblemen and officers shall have a dispensation to have a plurality, though they never attend, for the statute hath allowed them such a number. But sure there is a great difference, for though they never use them, yet they are retained to serve in ordinary without distinction. But these extraordinary chaplains of the king are retained not to serve the king; so that there is as much difference as can be between a retainer to do business, and remission of a man's duty afterwards, and a retainer to do no business at all, that is no retainer, as that is of the chaplains extraordinary, which is giving them a name: and though they be sworn, that is an abuse; for their oath must be to do something in which they are in duty bound, and that is nothing. Suppose a nobleman shall give a clergyman a faculty, and retain him to be his chaplain, and therein it is expressed that he shall not be obliged to attend and perform the divine service in his house or chapel, nobody can think that he is a chaplain qualified to take a plurality, but it is a plain evasion of the law. The inconvenience would be great, if these should be tolerated, and would be a defeating of the good purpose of the statute, which was to keep pluralities within some bounds. They did know how many chaplains at that time the king had in his service, and it is reasonable to be understood, that was a measure which they went by in making an allowance for these pluralities; which act, as was resolved in 4 Rep. 90 b. is to be taken strict against pluralities. It is objected, that it is found by the verdict, that the defendant Mugg was the king's chaplain, *legitimè constitutus capellanus extraordinarius*; that if he be the king's chaplain, it is sufficient without any more: and as to the word *extrasordinarius*, we cannot take notice thereof, unless the constitution of the king's family had been found, specifying what were those that were chaplains that did the service, and what these extraordinary chaplains were in relation to the king's service. This seems to be the most colourable objection in the case, and it had been better if the finding had been setting out the duty of the king's ordinary chaplains, and

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As to the second point, which is, whether *Mugg* should not have taken a dispensation, I am of opinion he ought to have taken a dispensation.

1st, I admit, that he need not have any dispensation to have a plurality by virtue of this clause of sect. 29, because there is no mention made of it in the clause, but he may take any number of benefices of the king's gift without incurring the danger of the act. In *Dyer* 312. p. 88. it is held, in case a lord's chaplain takes a plurality without licence or dispensation, that the first living is not void by the act, because the act only says, he *may* purchase a licence or dispensation. But *quare* of that case, for it seems otherwise, because pluralities are restrained by the purview; and as to the king's chaplains taking pluralities from other persons, or lords chaplains, the taking of a dispensation is a qualification for them to be out of the act. But to this case there is no mention of a dispensation; therefore, though the king's chaplain qualified doth take a plurality from the king without dispensation, his first living is not voided by this act.

But 2dly, though not void by this act, yet a dispensation is necessary; for otherwise the acceptance of the second from the king will make the first living void by the canon law, which law remains in force and is not repealed by the act of parliament, so far as it restrains the taking of pluralities. Though the act saith, "that the king's chaplains may take from him a plurality," that hath restrictive words,

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words, "without incurring the danger, penalty, or forfeiture of the act;" but he is not thereby exempted from the danger or penalty of the ecclesiastical law, to which he was subject before the act was made; for the act was made to restrain pluralities and to disable persons from taking them in a greater measure than before, but not to repeal any law that was in being against pluralities. That the canon law was so, appears by all our books ancient and modern. 1 Rep. 75. *Holland's* case, so resolved upon the authority of the old books there quoted. 4 Rep. 78. *Digby's* case, where the canon is said to be made at *Lateran* 1215, last of king *John*, that if one possessed of one benefice with cure of souls, accepts another, the first shall be void, and the patron may present to it. This canon hath not only been taken to be law in the court Christian, but it hath been pleaded for law, and a title hath been made to present to the first in a *quare impedit* in the king's courts; as appears by the old books, both in *Holland's* and *Digby's* case. 9 E. 3. 22 a. 10 E. 3.

This seems to be carrying the canon law very far for the temporal courts to take so much notice thereof, as to form a judgment at common law upon an ecclesiastical constitution without any sentence of deprivation given.

But some will say, how came it that this popish encroachment should continue to be law at this day? To which I answer, that though this canon made at *Lateran* had no force in itself, nor hath any foreign canon (though it were in its nature never so just and reasonable) unless it were received in *England* time immemorial, nor can it bind the clergy; yet the clergy may be bound by the establishing and confirming of it in convocation in this realm, as this canon was established at a provincial convocation held in the year 1278, 6 E. 1. before *Peckham* archbishop of *Canterbury* (*Lindw.* 135.) whereby all the clergy were bound: 20 H. 6. 13. 12 Rep. 73. *Cro. Jac.* 37. *Moor* 755. Which being a law of the clergy's own making and by which they were bound, the courts would take notice of it, because no disadvantage to the patron, whose interest was temporal: in *Jones* 404, *The King v. The city of London and Baldoek*, a man who hath a benefice with cure of souls under the value of 8 l. per annum accepts another under the same value without a dispensation; that avoided the first by the canon law, and the patron might resent without any deprivation. Now what difference is there between these two cases? One was not within the act of 21 H. 8.; as of *Mugg* is excepted out of it, and therefore parallel to that which was not comprized in the words of it: So that *Mugg* ought to

1700. to have taken a dispensation upon his being presented to *Ink-borough*.

But 3dly, as this case is, if *Mugg* had been a king's chaplain in ordinary, and had not taken a dispensation, the patron of *Stockton* might have presented: but in this case the lessor of the plaintiff is presented by the king to *Stockton* by reason of lapse. Now, though by taking the second living, the first, though under value, was void for the patron to present, yet it is not void to other purposes until deprivation. That difference is taken in 4 Rep. 75. *Holland's case*. Cro. Eliz. 357. The King against the Archbishop of *Canterbury* and *Priest*, Sav. 135. Now though *Stockton* should be void for want of a dispensation only, it is so quoad the patron, but as to the bishop and the king, it is full until there be a deprivation.

2d, If there had been a deprivation, which would have made the living totally void, yet lapse could not accrue to the bishop, nor consequently to the king, but from the time of notice. And though Justice *Jones* holds, that the ordinary's notice without deprivation will oblige the patron to present, under the danger of incurring lapse, yet, if the king present without notice, his presentation is void. 6 Rep. 29. *Green's case*. Hob. 301. *Gaudy v. The Archbishop of Canterbury*. Hutt. 66. *Rutt v. Bishop of Lincoln*, where the king presents by lapse when he hath no title to present, that presentation is void. But lord *Hobart* seems to mince the matter, and to qualify it by saying, it is void as to the patron, but as to all others he is a perfect incumbent, and shall sue for tithes, and is so much an incumbent that he is capable of confirmation. If that were so, then here is a good plenarty against *Mugg*, whose living is void for want of a dispensation, though not against the patron of *Stockton*; the consequence whereof is, that *Samuel Hill's* lessee shall recover, it not appearing that the true patron had presented. But I doubt lord *Hobart's* distinction is too fine to hold: for I think the king's presentation by lapse is void to all purposes, though the church were void, if the king had no title to present by lapse: for the parishioners may take advantage of it, and refuse to pay tithe. Cro. Jac. 252. *Hunston v. Cockett*.

But not to litigate lord *Hobart's* opinion, by the acceptance of a plurality, the church is void as to the rightful patron, but as to others it is full of *Mugg*, and therefore when the king presents the plaintiff's lessor, he presents to a church that is full; and therefore if the case had stood upon this point, as it would, if *Mugg* had been a person qualified, though he ought to have had a dispensation, yet the

the lessor of the plaintiff would not have had a good title. But, soasmuch as *Mugg* was not a king's chaplain exempted by this 29th *sect.* from the forfeiture by the statute, his acceptance of *Inkburgh* causes an avoidance to *Stockton* by the which continued void for 20 years, so that the king had a good title by lapse; and he having presented the lessor of the plaintiff, he hath a good title, and therefore the plaintiff ought to have judgement.

H. 13 W. III. A. D. 1701.

Coe v. Smith. [Decree-Book, 20th Feb.]

THE rector of *Elmsfett*, in the county of *Suffolk*, claimed the tithe of log trees, and the loppings and toppings of other trees in kind, and for the agistment of barren and unprofitable cattle.

Tithe due of wood made into charcoal.

The defendant admitted that the plaintiff was rector, and entitled to all tithes belonging to the said rectory, and stated, that he was an inhabitant of the parish of *Hadleigh*; that he neither inhabited nor occupied nor owned any lands or tenements whatsoever in the parish of *Elmsfett*; but he confessed that he had bought log trees and loppings and toppings for 4l. 10s. and had felled and converted them into *charcoal*, the tithe of which, if tithable, was worth 20 s. He also confessed, that in one year he had put 10 bullocks to pasture for five weeks with an owner or occupier of lands in the parish of *Elmsfett*, and averred that the said owner or occupier had paid the tithes of his lands in the said parish.

The court was of opinion, that tithes in kind are due for wood converted into charcoal, and also for the tithe herbage, the value of which tithes the parties, by consent, admitted to amount to 6l. 12s. 6d.

It was accordingly decreed, that the defendant do satisfy and pay to the plaintiff the said sum for the value of the said tithes, together with costs of suit, to be taxed by the deputy remembrancer of the court.

1701.

P. 13 W. III. A. D. 1701. B. R.

Durrant v. Esoty. [2 Lutw. 1071.]

A custom to discharge the latter-mowth of clover-grass from tithe, in consideration of the parishioners making the first mowth into grass of equal cocks at his own expence, and setting out the tenth cock, is good.
* *Pratum fructu fundum.*

IN prohibition to the spiritual court to stay a suit for the tithes of the latter-mowth of clover-grass, it was suggested, that within the parish of *Scottowe* in the county of *Norfolk*, there is a custom, that every person having and possessing any * meadow or farm in any one year within that parish, whereon any hay has been gotten or arisen, hath been used and accustomed to make the first mowth of the grass into cocks of equal quantities at his own costs and charges, and to set out the tenth cock thereof for tithes for the vicar, in full satisfaction of all and singular the tithes as well of that mowth as of the latter mowing or mowth; and that the vicars of the said parish have always time immemorial accepted and taken the said tenth cock accordingly.

The court inclined to be of opinion, that a prohibition does not lie in such a case without an allegation of a custom: but, after debate by the counsel for both parties in this case, a rule for a prohibition *nisi, &c.* was made absolute, and no difference was made between the latter-mowth of clover-grass and ordinary grass. *Cro. Ja.* 116. and *Yelv.* 86. *Greene and Austin's case*, supra 226.

M. 13 W. III. A. D. 1701. B. R.

Byne v. Doddridge. [1 Lord Raym. 696.]

A *modus* to pay 2 s. in the pound out of the rents reserved is void.

Litt. Entr.
311. S. C.
12 Mod.
563. S. C.

CHESHYRE moved against a rule for setting this aside, being granted to discharge another rule before made, by which a prohibition was granted to the spiritual court, to stay a suit there for tithes upon suggestion of a *modus*; and this last rule was made upon allegation, that the plaintiff had had a prohibition granted before, and that he had declared upon it, and that issue had been joined upon it, and a verdict found in it against the plaintiff. And that which *Cheshyre* now urged against this last rule was, that the *modus*, upon which the rule was made for the granting of a prohibition, varies from the *modus* upon which the prohibition had been granted before, and the verdict had; and therefore, that this case was not within 50 *E. 3. c. 4.* For the present *modus* suggested is, that they have used to pay 2 s. in the pound of the rent reserved;

reserved; whereas the former modus was, that they used, &c. to pay 2s. in the pound of the profits received. And he cited *Hob. 192.*

1701.

Against this, *Broderick* said, that this modus was not good; for, as it is laid in the suggestion, if the plaintiff keeps the lands in his own hands, he shall pay nothing to the parson; for the modus is laid to be paid out of the rent reserved. 2. He may let a lease at a smaller rent upon payment of a fine. And he cited 1 *Ro. Rep. 378.* 2 *Ventr. 47.*

But (*per Chesbrey*) that would be a fraud.

Curia contra. It would not be a fraud. And (*per Holt C. J.*) 1. This cannot be a modus, it amounting to as much as the tithes in kind; but, it may be a composition. 2. A custom cannot be applied to rents reserved from time to time upon frequent new reservations. And the rule for discharging the rule granted for the prohibition was made absolute.

Tr. 2 Ann. A. D. 1703. Scac.

Lifter v. Foy. [Decree-Book, 1st June.]

THE vicar of *Buckland Abbas*, otherwise *Newton*, in the county of *Dorset*, filed his bill for an account of all small tithes and other duties therein, and in the tithings of *Buckland, Knowle, Brockhampton, Dunkish, Mineterne Parva*, and *Plusb*, thereto belonging.

The defendant *Foy* stated the custom of tithing in the said parish to be as follows: First, that any inhabitant having under seven calves or lambs fallen, ought to pay to the vicar one halfpenny for each calf or lamb; if seven or above, and not ten, to pay one, the vicar paying the inhabitant, if not above seven, three-halfpence; if eight, then one penny; and if nine, then a halfpenny. Secondly, for a calf killed, to be spent in the inhabitant's own house, the vicar to have the best shoulder, if the parties have not that year calves enough to make the number of seven. Thirdly, for every calf sold, where the party hath not enough, with the calf sold, to make up seven, the tenth penny for what it is sold is paid. Fourthly, one penny for every colt foaled, paid at *Lammas Day*, whether afterwards reared or sold, and no greater sum for the pasturage of such colt. Fifthly, that after tithes paid for calves as aforesaid, no further consideration is, by custom, to be given in lieu of tithes for them for any year after till such calves be reared and used for plough or pail; and nothing paid for the tithe of pasturage of any calf, heifer, or sheep, or colt intended for plough or pail; nor for any

A custom to pay between *St. Mark's* day and *All Saints* day the tenth ordinary cheese or tenth day's milk once skimmed and made into cheese, in full for *cow white*, the cheese to be collected when stiff, or every fortnight or three weeks, is void.

A custom that such lambs as are able to subsist without the ewes on *St. Mark's* day shall be tithed; and that such lambs as are not able to subsist without the ewes on that day

1703.

shall be
tithed when
they are able
to subsist
without the
ewes is
good.
Locks of
wool are not
tithable.
Wind-fall
apples are
tithable.

plough-cattle used about managing arable land out of which the vicar or parson have tithe corn. Sixthly, that the custom in *Brockhampton* and *Dunlish* tithing and *Clinger* is, for every inhabitant, betwixt *St. Mark's Day* and *All Saints Day* yearly, to pay the tenth ordinary cheese, in full for cow white, to be collected when stiff, or every fortnight or three weeks. Seventhly, that the custom of tithing in *Mineterne Parva* and *Plush* (except *Clinger*) is to pay two-pence *per annum* for each cow, and three-halfpence for each heifer, in full of tithe of cow white; and in *Henley*, three-pence each milk cow, and two-pence each milk heifer; and in *Huntwell* farm, four-pence a cow, and three-pence a heifer; and in *Knowle* tithing the like, and two-pence for every barren cow milked, in full for tithe of cow white. Eighthly, that the inhabitants ought to be free from payment of tithes of locks of wool. Ninthly, that calves ought to be paid for at the end of a month after their fall. Tenthly, that tithe apples and pears ought to be paid (except fallings). And, eleventhly, one-penny for a garden, and two-pence for every communicant.

The defendant *Hopkins* also insisted on the said *modus*.

To which answers the plaintiff put in a special replication, and thereby admitted to have received several tithes and tithable matters from the defendants, arising within the said parish and the several tithings thereof for the time demanded by the bill; but said, that the defendants had several other tithes and tithable matters charged in the bill within the said parish and the tithable places thereof, for which they have not paid tithes, but ought to pay the same.

The defendants rejoined; and witnesses were examined on both sides; and upon full debate of the matter, the court declared, that the custom set forth in the defendant's answer(y), for every inhabitant in *Brockhampton* and *Dunlish* hamlets and *Clinger*, betwixt *St. Mark's Day* and *All Saint's Day* yearly, to pay the tenth ordinary cheese, or tenth day's milk once skimmed and made into cheese, in full for cow white, the cheese to be collected when stiff, or every fortnight or three weeks, was a void custom.

And as for the custom of tithing of lambs on *St. Mark's Day*, the court allowed, that such lambs as are able to subsist without the ewes on *St. Mark's Day*, are to be tithed; but that such other lambs as

(y) It is remarkable, that the decree does not state that part of the answer, which respects this custom. I have searched for the bill and answer, but, though there is a reference to them in the Index Book, I have not been able to find them among the records. The state of those records claims the serious attention of parliament;

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are not able to subsist without the ewes on *St. Mark's Day*, are to be tithed when they are able to subsist without the ewes.

1703.

It was thereupon ordered by the court, that the said defendants should account with and pay to the plaintiff the value of their several and respective tithes due and in arrear from them to the time of the bill (except for *locks of wool*, for which they are not to account). But that they are to account for all fleece-wool whatever..

Tithes of locks of wool not to be accounted for.

And it is further ordered, that they shall account for the tithes of such apples as fall from the trees.

P. 3 Ann. A. D. 1704. Scac.

Gee v. Perch. [Decree-Book, 11th May.]

BILL by the lessee of the rectory of *Orpington* in *Kent*, (*inter alia*), for the tithe of wood, and stating that the defendant did not set out his tithe-wood in such manner as he ought to have done, he leaving only some loose ranges or heaps of wood for his tithes, without ingrain, binding, or making up the same, as by the law, custom, and manner of tithing used in the said parish he ought to have done; that the defendant did not, in the said years, set out his tithe hops as he ought to have done, but left, as he pretends, the tenth hill or pole without picking, in lieu of tithes; and that the defendant ought to have picked his hops from the bines or poles before he set out the tithes thereof.

The defendant said, that for the years in the bill mentioned he had held and occupied in the said parish about 100 acres of coppice wood, and particularly *Clay Wood*, containing 20 acres, and the wood also adjoining to *Crawton Heath*, four acres; that in 1698 he cut *Crawton Heath Wood*, and in 1701 and 1702 *Clay Wood*, but that before he cut down and carried away any of the said wood, he applied to the plaintiffs to see the tithes of the said woods set out and separated from the nine parts as followeth; *viz.* when his servants had cut down a small parcel they piled it up in ten several heaps of equal size and goodness, and, to prevent disputes about the tithes, he had the said ten heaps viewed by indifferent persons, and caused the best of the said ten heaps to be left for the plaintiff's tithes, and then the defendant's workmen proceeded in the same method from place to place, until the tithes of both woods were duly and fully set forth; and he said, that he believed that the like method of paying tithe-wood is, and was the only method used in the said parish, and that

The defendant says, that the ash poles were for the purposes of husbandry.

That he set out his tithe wood in piles, without size-binding it, or making it up.

1704.

the said wood was not to be size-bound, or made up at the defendant's charge into a marketable ware; that the wood adjoining to *Crawton Heath*, when cut down, was not worth above 40 s. an acre, and *Clay Wood* 3 l. an acre, to be sold; and that, after the tithes set out, the said woods cost him more than the remaining nine parts of the same were worth; that notwithstanding he set out the full tenth part of *Crawton Heath Wood*, wherein he had for his nine parts but 3670 bays; that he had used 3423 of the same for necessary firing upon his farm, for which he need not to have paid any tithes; that in 1702 he cut down and carried away one load and a half of alder trees, of about 50 s. value, without setting out his tithes, he having occasion to use them to make and mend ploughs, harrows, and other utensils of husbandry about his farm, and sold no part thereof; for which reasons, and because they were about 20 years growth, no tithes were due for the same.

The court
of opinion
that the
wood ought
to be bound
up.

The court were of opinion, and declared, that the way and method used by the defendant in setting out his tithe-wood by loose heaps, in boughs, is no good way of setting out his tithe-wood; and that it appears by the proof taken in the cause, that the usage and manner of tithing of wood in the parish was, and time out of mind had been, for the occupiers to bind up the wood before the tithes thereof are set out, and that no such manner of tithing by loose heaps or ranges was ever known in the parish.

It was therefore ordered and decreed, that the defendant should pay to the plaintiff for all the tithes of the woods in the bill mentioned; to wit, for *Clay Wood*, and the wood lying near *Crawton Heath*, according to their respective values thereof when the wood is cut and bound, as usually had been done by the occupiers.

Ward, chief baron, said, that if wood has been used to be bound by the parishioners, the tithes of the said woods ought also to be bound up. That ash poles, not fit for timber, are to pay tithes.

Bury, baron, said, that the method set forth by the defendant for setting out the tithes of wood in heaps is not good. That ash poles are tithable though they are of 20 years growth.

Price, baron, thought that ash poles used in husbandry were not tithable. And as to wood, that the defendant had rightly set it out, and that the plaintiff ought to have no account.

Smith, baron, said, that as to ash poles, he was of opinion that the defendant is not to account; and that he ought to account for the tithe of wood, the plaintiff having proved the usage.

Note. The plaintiff relinquished his claim as to the ash poles.

M. 3 Ann. A. D. 1704. Scac.

Archbishop of *York* and others v. Duke of *Newcastle* and others.

[Decree-Book, 9th Nov.]

A BILL being filed by the lessee of the rectory of *Kilburne* in the county of *York*, under the archbishop of *York*, for tithes in kind of certain farms within the parish, the defendants, as to those farms, set up the following moduses, viz. as to two of the farms, a modus of ten fleeces of wool, and two and a half lambs, or 1 s. 6 d. in money in lieu of the half lamb, in full discharge of all tithes whatsoever. As to two other farms, a modus of six fleeces of wool and three lambs, for all small tithes; and as to a fifth farm, a modus of eight fleeces of wool, and 4 s. in money, in discharge of all tithes whatsoever for that farm.

Upon these moduses a case was settled for the opinion of the barons, and they, being attended by counsel, differed in opinion respecting them. We collect from Mr. Serjeant *Salkeld's* Report, and lord chief baron *Dodd's* manuscripts, that as to the first modus, [and of course as to the second], *Price* and *Bury*, barons, were of opinion it was an ill modus; because it was one kind of tithe for another. *Cro. Eliz.* 446. 471. *Moore* 554. 1 *Ro. Abr.* 649. 659. *Hardr.* 174. *Cro. Car.* 276. 1 *Ro. Rep.* 120. *Hob.* 39. And there is great uncertainty, for one fleece may be twice as big, and three times the value of another.

Ward, chief baron, and *Smith* baron, *contra*, that it was a good modus, for it is not in discharge of wool and lamb only; and any thing of a tithable nature may be given in discharge of tithes, as well as money; as, an acre of land, &c. And the difference is, where it is in discharge of the species of tithe, and where of the land, *Litt.* § 144. *Noy* 148. *Dy.* 349 b. *Hob.* 44.: that, to be sure; payment of tithe of one kind, or payment of a modus for one kind of tithe, could not be a discharge as to another kind: but this, they said, was not a payment of tithe, because it was to be paid in all events, whether there were sheep or not. And they denied the case of 1 *Ro. Abr.* 651. and held the modus no more uncertain, than to pay a modus of ten cheeses, which may differ vastly both in nature, quantity, and value; that it tended to the disquiet of the country to break in upon customs and usages; and it ought not to be done, but upon plain and manifest reason.

1704.

As to the last modus, it was holden good by the Chief Baron, *Price and Smith*; *Bury* dissentient.

In consequence of this difference of opinion upon the bench, a trial at law was ordered upon the moduses; and upon the trial of the issues a verdict was found for the plaintiff, the lessee of the archbishop of *York*; but on the motion of the defendants, a new trial was afterwards granted. However, it does not appear from the books of the court, that any further proceedings were had in the case.

M. 3 Ann. A.D. 1704. Scac.

Witherington v. Harris. [Decree-Book, 5th Dec.]

BILL by the lessee of the rectory of *Thorpe*, in *Effex*, for tithes of wheat, clover-grass, and wood.

The defendant says, that he set out the tithes of the first crop of clover in swathes; that no tithes are due for the second crop, nor for the firewood sold, it being the loppings of *old bowlings*.

The defendant admitted, that in the year 1701, he had cut clover-grass twice, and set out the tithes of both the first and second crop in swathes, according to the custom used in the said parish; that in the said year he cut six acres of grass, three acres of which he set out in grass cocks, which the plaintiff accepted, and the other three in swathes; and in that year he had wheat, the tithe of which being duly set out, the plaintiff accepted. He confessed, that in 1702 he mowed a second crop of the clover-grass, but did not set out the tithes thereof, insisting, that no tithes were due, nor ever had been paid, for the second crop of clover-grass. He also confessed, that in the said years he had cut and sold two loads of firewood, being the loppings of *Old Bowlings*, for which he insisted, no tithes were due.

The setting out the clover in swathes disallowed; and the tithes of the second crop, and of the wood, decreed to be paid.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading the proofs taken in the cause, the court disallowed the custom insisted upon by the defendant in his answer for setting out his tithes in swathes, and ordered the defendant to account for and satisfy the plaintiff the value of the tithes of his first and second crop of clover-grass, and of his other grass, and for his wheat, and for the wood by him cut and sold, for which no tithes had been paid.

P. 4 Ann. A. D. 1705. Scac.

Bishop v. Arundell. [Decree-Book, 22d May.]

BILL by the rector of *Tarrant Keynston*, in *Dorsetshire*, for tithes in kind.

The defendant *Arundell*, by his answer, said, that the plaintiff was rector of the said parish, and entitled as stated in the bill; that he, the defendant, was owner of *Tarrant Keynston Farm*, and of several lands thereto belonging, in the occupation of the other defendants his tenants; that he had no part of the said farm in his occupation during the said time, except two coppices and wood grounds, called *Ash Leys Coppice* and *Heath Coppice*; that *Ash Leys Coppice* is reputed to be no part of the said farm, but that *Heath Coppice* is; and he set forth the particulars of the wood cut upon the said coppices in 1701 and 1702, part of which he said was used in fencing, and the remainder sold, and that he had duly paid the plaintiff for the tithes thereof; that in the year 1703 no wood was cut; that, time beyond the memory of man, no tithes in kind had been paid for the said farm and lands, but that the defendant, and those whose estate he had, paid to the rector a *modus* of 26 l. a-year in full discharge of all tithes for the said farm; that the defendant had, from time to time, paid the plaintiff, all the time he had been rector, the said *modus* of 26 l. a-year, which he had accepted, in discharge of the said tithes, except for one year only, ending at *Michaelmas*, which the defendant had tendered to him before the filing of his bill, and now offers the same by his answer.

The defendant says, that *Ash Leys* is no part of the farm, and that there is a *modus* of 26 l. a-year payable to the rector in lieu of the tithes of the said farm.

The other defendants admitted the plaintiff to be rector, and set up the said *modus*, which they said they had tendered to pay their proportions of, and that no tithes in kind had ever been paid, and they set forth their tithable matters.

Two issues were directed to be tried (z), First, whether there is, and, time whereof the memory of man is not to the contrary, hath

Issues directed to try the *modus*, and whether *Ash Leys* is part of the farm.

(z) It is to this part of the cause, no doubt, that the resolutions of the court, as given by chief baron *Dodd*, refer. He states, that the court resolved, 1st, That if the plaintiff would avoid the *modus*, as unreasonable in value, it lay upon him to prove the value of the farm; and not necessary for the defendant to make it reasonable in respect of the value. 2d, That the *modus* was not on the face of it void, in respect of its largeness, and being for a farm only; nor would the court permit the value to be inquired into, but generally directed the *modus* to be tried. *Dodd* adds, *Quod mirum*, for he never knew a 26 l. *modus* before. This note is referred to in *Bunb.* 301.

been,

1705.

been, a *modus* of 26 l. *per annum* payable to the rector of *Tarrant Keynston*, for the time being, by the owners and occupiers of *Tarrant Keynston Farm*, in satisfaction and discharge of all tithes arising upon the said farm, and the lands and grounds thereunto belonging.

Secondly, whether the coppice and wood-grounds in the said parish, called *Ash Leys Coppice*, is part of the said farm called *Tarrant Keynston Farm*?

Verdict for the defendants, but a new trial directed to try

A trial was accordingly had upon the said issues, and the jury found the same for the defendants; but, upon reading the said order and *postea*, a new trial was directed to be had upon the two following issues;

the value of the farm,

First, What was the annual value, one year with another, of *Tarrant Keynston Farm*, now in question, at the time of exhibiting the plaintiffs bill against the defendants, and for the major part of 60 years before?

and the existence of the *modus*.

Secondly, Whether there is, and time whereof the memory of man is not to the contrary hath been, a *modus* of 26 l. *per annum* payable to the rector of *Tarrant Keynston* for the time being by the owners and occupiers of *Tarrant Keynston Farm*, in satisfaction and discharge of all tithes arising upon the said farm and the lands and grounds thereunto belonging?

To be tried by a special jury; and the defendants to have the costs of the last trial, taxed and paid before they proceed to trial.

Verdicts for the plaintiff.

A trial was accordingly had upon the last-mentioned issues, and the jury found both the issues for the plaintiff, *viz.*

As to the first issue, that the yearly value of *Tarrant Keynston Farm*, for 60 years before the filing of the plaintiff's bill in this court, was 400 l. a-year; that 30 years before filing such bill the same was 350 l. and at the time of filing, 300 l. *per annum*.

As to the second issue, the jury found that there was no such *modus* of 26 l. *per annum* payable in discharge of the tithes of *Tarrant Keynston Farm*, as by the defendants was pretended.

A new trial moved for, but refused.

The defendant's counsel now alleging that the verdict was not to the satisfaction of the judge who tried the cause, Mr. Baron Smith was desired to speak to him.

Upon reading the order the 12th of *November* last, and the return of the *postea*, whereby it appeared the verdicts were given as aforesaid; and upon hearing counsel on both sides, and it appearing to the court that the judge who tried the cause was not dissatisfied with the said verdict, it was ordered, that the several defendants should account with, satisfy, and pay to the plaintiff for the

Tithes in kind of the farm and the coppice decreed.

tithes

tithes of the several tithable matters and things which they respectively had renewing and arising on their respective tenements, lands, and grounds, and *the heath coppice*, which they respectively held and occupied within the said parish and rectory of *Tarrant Keynston* during the time in the bill charged.

P. 4 Ann. A. D. 1705.

Startup v. Dodderidge.

M^{R.} *Broderick* moved for a prohibition to a suit in the ecclesiastical court for tithes, upon this suggestion, *quod a tempore cuius, &c. habebatur talis antiquus usus et consuetudo de modo decimandi de et pro omnibus decimis quibuscunque infra parochiam de W. et fines, limites, et loca decimabilia ejusdem quoquo modo crescentibus, renovantibus, sive contingentibus, viz. quod omnes et singuli proprietarii, eorum firmarii, vel occupatores aliquarum terrarum vel tenementorum infra parochiam de W. prædictam, &c. per totum tempus prædictum annuatim solverunt, et solvere consueverunt, rectori ecclesiæ parochialis de W. prædictæ firmario sive deputato rectoriæ illius pro tempore existenti* upon request *secundum ratam 2 s. legalis monetæ Angliæ pro quâlibet et utrâque librâ veri adaucti annualis redditûs vel valoris, Anglicè, of the true improved yearly rent or value, respectivorum terrarum et tenementorum infra parochiam de W. prædictam, &c. et non ultra, in nomine, loco, ac in plena satisfactione, omnium et singularum decimarum quarumcunque annuatim crescentium, &c. in vel super respectiva terras et tenementa sua infra parochiam de W. prædictam, &c.* which the several rectors, &c. have time out of mind accepted in full satisfaction, &c. of all tithes, and the custom aforesaid inviolably observed; yet the defendant knowing the premises, has sued the plaintiff in court *Christian* for subtraction and non-payment of tithes of hay and wheat in and upon the lands and tenements aforesaid, in the tenure and occupation of the plaintiff, being in the year of our Lord 1696, growing, &c. and supposed by him to be subtracted and taken away, *licet* the plaintiff, &c. And a rule was made for the defendant to shew cause, why a prohibition should not be granted. And now *Mr. Pengelly* moved, that the rule might be discharged. He said, this *modus* was not good for the uncertainty, for the yearly rent or value is variable and utterly uncertain, and may change every year; but a *modus*, which is against common right, and goes in destruction of the original

A custom to pay 2 s. in the pound of the true improved yearly rent of land in lieu of the tithes of it, is void. S. C. Salk. 657. R. acc. ante 696. 12 Mod. 563. Sed vide Hob. 192. And so is a custom to pay a proportion of the true improved yearly value. A suggestion for a prohibition to a suit for tithes on account of a *modus*, need not shew a compliance, or an offer to comply with the *modus*.

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ginal right of the parson to take his tithes *in specie*, ought to give the parson a certain recompence for a certain duty, otherwise the court cannot adjudge that it is suitable. And he cited the case of *Perry v. Soame*, *Cro. Eliz.* 139. where, in a suit in the spiritual court for tithes of herbage of dry cattle, the defendant surmised for a prohibition, that every parishioner there, who had milch kine and calves under the number of seven, shall pay for every calf he rears a halfpenny, for every one he kills a penny, and for every one he sells the tenth penny; and if he has seven or above, to give one in satisfaction of tithes of them, and of all dry cattle. And they held this to be an ill *modus*, because, if the parishioner had only dry cattle, and no calves, he pays nothing, and it is uncertain, whether he shall have calves or not, and so it is an uncertain thing for a certain duty. And *Allen's case*, 2 *Roll.* 265 *d. p. 2.* a prescription to pay one penny, or thereabouts, for every acre of arable land, in lieu of tithes, naught for the uncertainty. And 1 *Keb.* 612. *Took v. Ledgard*, a *modus* to pay 4 s. for every day's ploughing of wheat, and 2 s. for every day's ploughing of barley, is not good for the uncertainty; but, if the *modus* had been, so much for every day's work, with an averment that it is certainly known, and the contents of it, it might be. And a note on the side of Dr. *Leyfield's case* in *Hob.* 11. where the principal case was, a libel for tithes of stables, suggesting a prescription time out of mind for the parsons to have a *modus decimandi* for the houses, stables, and buildings, *viz.* after the rate of the tenth part of the yearly rent or value of the same, and a prohibition was granted in the case, with directions to declare. And on the side of that case is this note, *viz.* that *modus decimandi* can hardly stand to rise and fall according to the rent by prescription. And though such a *modus* be allowed to be good in Dr. *Grant's case*, 11 *Co.* 15 *b.* yet that case is made a question in 1 *Roll.* 642. *n. 1.* and the authority of Dr. *Leyfield's case* opposed to it. Secondly, this *modus* is void, because it gives room to the parishioner to defraud the parson, for it is in the power of the parishioner to take a great fine, and reserve a small rent, and so the parson shall have nothing. For the custom is to pay 2 s. per pound *veri adaucti annualis redditus vel valoris*, *Anglicè*, of the true improved yearly rent or value, *respektivorum terrarum et tenementorum* also, the parson cannot come to the certain knowledge, what rent was reserved. And he cited the case of *Wilson v. le Evesque de Carlisle* *Hob.* 107. 1 *Roll. Abr.* 647. *pl. 5.* 2 *Danv.* 601. *pl. 5.* a *modus* for tithe wool, that if the parishioner had under ten fleeces, that he should

should pay 1 d. to the parson for each, in lieu of tithes; and if he had more, that he should deliver to the parson the tenth part of his wool, upon his conscience, without fraud or covin, *sine visu vel tactu* of the parson; and held to be ill, because it lays the parson open to be defrauded. And my lord *Hobart*, in his report of the case, says, that it is a weak answer to say, that if it be not a just tenth, the parson may refuse it, and sue for his due: for first, he hath no means to be assured whether it be true or not, so his suit may be causeless; sure he may be it may be fruitless. *Hob. 107. 1 Roll. 647, 648. p. 5.* Secondly, the suggestion in this case is not sufficient, because it is not averred, what was the value of the land, nor what rent was paid for it, as it ought to have been; for it is only said, *licet the plaintiff obtulit et paratus fuit et existit ad solvendam prædictam ratam 2 s. pro quâlibet et utràque librâ veri adaudi annualis redditus vel valoris terrarum et tenementorum prædictorum, &c.* without saying how much that was, or what sum was tendered; and for this the suggestion is ill. For in every suggestion of a *modus*, the party ought to aver the performance of the consideration, or something which tantamounts, and so bring his case within the compass of the custom, by averring that he has done as the custom requires. And for that he cited *1 Roll. Rep. 38, 39. 62. Cro. Eliz. 139.* [Note, the case in *Rolle* is against the objection, and takes the distinction, where the *modus* extends to such of the parishioners as keep cows, &c. there, the plaintiff must shew, that he keeps cows; but, where the *modus* is to pay money, &c. in lieu of tithes, there, the plaintiff need not allege payment, &c. because it is a good ground for a prohibition, that the parson sues for tithes in kind, whereas a *modus* ought only to be paid, and not tithes in kind, and, consequently, the parson ought to sue for the *modus*. *1 Roll. Rep. 63. S. C.* And the case of *Croke Eliz. 139.* well understood, turns upon the same distinction.]

Mr. serjeant *Broderick* said, that the value of land was certain enough, and made the *modus* certain enough, according to the rule, *id certum est quod certum reddi potest*; that the value of land was such a certainty as the law took notice of; and therefore where a man demised a chamber, paying for it yearly so much as it should be reasonably worth, debt was brought for the rent, with an averment that the lessee held the chamber from such a time to such a time, and that for that time it was reasonably worth so much. *Stiles 397. Farmer and Lawrence.* And in powers in settlements for tenants for life to make leases, it is a common *proviso*, that the best improved

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* Semb.
acc. Dougl.
696.

proved rent, that may be reasonably had for the same, be reserved; And *Cro. Jac.* 671. *Page's* case, it was held to be a good custom of a manor, that the land was demisable for 21 years, paying three years value. So 2 *Leon.* 117. a tenure was by the service *solvendi post quamlibet vacationem sive alienationem* the value of the annual profits of the lands, So is the case of *Titus v. Perkins*, 3 *Mod.* 132. the custom of a copyhold manor was for the tenant, upon admittance to pay to the lord for a fine, *tantam denariorum summam quantam* the tenements *valebant per annum tempore talis admissionis*; and adjudged by the common pleas, and affirmed upon a writ of error in the king's bench, to * be a good custom, because it is certain enough, and issuable, and triable by the country, if it be of such a yearly value or not. 3 *Lev.* 255. 3 *Mod.* 132. And that, as it is certain enough, so of consequence it is well enough known. He said, that the principal case of *Dr. Leyfield* was for him; and that as to the marginal notes, they were not to be regarded, being added as he supposed by the editor of the book, but were not my lord *Hobart's*, many of them being of matters which happened after his death. He said, that *Dr. Grant's* case was in point, where the case was, a libel by *Dr. Grant* in the spiritual court alleged a custom for every parishioner, &c. occupying, &c. a mansion-house, &c. to pay quarterly *nomine et loco decimarum suarum juxta ratam cujuslibet* 20s. rent *per annum ex quâlibet hujusmodi domo*, &c. 2s. and upon a suggestion of a discharge by the 31 *H.* 8. a prohibition was granted, and upon traverse of the suggestion, there was a verdict for *Grant*, and upon motion by *Grant* for a consultation, it was opposed, because the custom was against common right, no tithes being to be paid for houses, and therefore void. But a consultation was granted, because this might have a lawful commencement; for this *modus decimandi* might have been paid time out of mind for all the tithes of the land, upon which the houses were built, and the lands being built after would not take away the right of the parson. 11 *Co.* 15 *b.* He said, that though according to this *modus* the parson might have more one year, and less another, yet that would not make it void; and for that he compared it to the case in *Co. Litt.* 96 *a.* a tenure to shear all the sheep depasturing within the lord's manor; that is certain enough, although the lord hath sometimes a greater number there and sometimes a less, being referred to the manor, which is certain.

Holt chief justice was of opinion upon the first stirring of this case, that the *modus* was not good; and that upon the face of it, it

it appeared plainly to be nothing but an agreement between the parson and the parishioners. If it were an ancient composition with the consent of the patron and ordinary, before the 13 *Eliz.* c. 10. that would bind the parson ; but then that was no ground for a prohibition, being it might be pleaded and tried below in the ecclesiastical court. That there had been formerly prohibitions granted upon suggestions of compositions, and that there were old cases to that purpose, but that it had been held otherwise since ; which *Powell* agreed. But, if it were a composition made since 13 *Eliz.* it was void. He said, that a composition time out of mind was a *modus*. Taking it to be a *modus*, it would be hard to maintain it to be good ; taking it as to the yearly rent, it could not be good, because the land might be unlet, and then no tithes would be paid ; or it might be let at an under-rent with a fine, and then the parson would be cheated. And as to the value, in case the lands should be unlet, who should determine what that was ? He said, that if the *modus* were void, it was in vain to grant a prohibition to try it, because, though it should be found for the plaintiff, yet the court must grant a consultation. And to that purpose he remembered the case of *Hicks v. Woodeson*, adjudged *Hil. 8 Will. 3. B. R. ante 550* : where a prohibition was granted upon a suggestion of a custom within the hundred of *D.* to pay no tithes for agistment of barren cattle, and in a declaration upon the prohibition issue was joined upon the custom, and found for the plaintiff, and notwithstanding, because the custom was void in law, a consultation was awarded. And he remembered the distinctions taken in that case, about a custom *in non decimando*. He said, that *Dr. Leyfield's* case was a full case against the *modus*, for that the parson might sue in the spiritual court for the customary duty ; which the rest of the judges agreed. As to the exception to the suggestion, he said, it was well enough ; for it was enough for the plaintiff that came for the prohibition to bar the defendant of his suit in the court below, which is sufficiently done by the suggestion of this *modus*, if it be good ; for then the parson ought not to sue for tithes in kind, but for the *modus*. But the last time the case was stirred, after hearing *Mr. serjeant Broderick*, he was for granting a prohibition, and putting the plaintiff to declare, and the defendant might demur, and the point be determined judicially. I did not well hear his reasons, but I apprehended them to be, because the value of land was a thing well known, and consequently certain enough : that if such a composition had been made before 13 *Eliz.* and confirmed, it would have

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have bound the successors: that as the parsons might by custom have tithes of things, of which they had no right to have any by the common law, as fish, &c. so custom might model or restrain their tithes, or alter them.

But the other three judges were against granting a prohibition; because this was a void *modus*, being an uncertain recompence for a certain duty. And therefore, though it might be certain enough for a tenure or contract, yet it was not so certain, as that in consideration of that, they could adjudge the parson ought to be barred of his tithes in kind. Also, they thought this unreasonable, because the *quantum* of the rent was not in the conuance of the parson, and so he could not know what to demand or sue for, and was exposed to be cheated; and for the value of the land, they thought it unreasonable, that the parson should be put under a necessity every year of trying that, upon any difference between him and his parishioners, upon the peril of costs. They said, that it was plain this was an agreement between the parishioners and some of their former parsons, and now they had a mind to turn this into a *modus*; but that it could not be.

Powell, justice, said, there was no case like this in the law, where a prohibition had been granted upon such an uncertain *modus*. *Powys*, justice, said, that the *modus* was too high, viz. 2 s. in the pound, and that while he sat in the exchequer, if a *modus* were high, they always disallowed it; your ancient *moduses* being very low, 1 d.; or 2 d. &c. And the rule to shew cause was discharged by the three judges against the chief justice. The same motion was made in the common pleas in *Trinity* term following by serjeant *Weld*, and opposed by serjeant *Parker*. And the chief justice, and *Nevill*, and *Blencowe*, held the *modus* void; but *Tracy* gave no opinion, it not being necessary. And in a case by *English* bill in the exchequer between the same parties^(a), the *modus* was decreed to be void by all the barons. In consideration of which judgements in the king's bench and exchequer, the three judges of the common pleas said, they would not have granted a prohibition, though they had not thought it so clearly a void *modus*. *Ex relatione m'ri Pengelly*.

(a) It appears by Mr. *Wood's* book, that in a case in the exchequer between these parties, Tr. 2 W. & M. where this *modus* was set up by the defendant, the plaintiff's bill was dismissed, though without costs. 1 *Wood's* Decr. 283. In *Chapman v. Patching* in the exchequer, Tr. 8 W. 3. the defendant insisted upon a like *modus* of 2 s. in the pound, according to the rent, and that no tithe in kind was ever paid. But the court declared, that tithe in kind ought to be paid, and decreed an account. So, *Jackson v. Smith*, in the exchequer, 26th Jan. 1726.

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M. 4 Ann. A. D. 1704. Scac.

Humphreys v. Stopher. [Decree-Book, 10th December.]

THE rector of *Spexhall*, in the county of *Suffolk*, charged by his bill, that the defendant, for two years, farmed and occupied several lands in the said parish, and had yearly quantities of corn, grain, and turnips, growing thereon, and had fed several cows; for all which he ought to have paid tithes.

The defendant said, that he had occupied land in the said parish for three years past; and that in the year 1702 he sowed some acres of turnips, and gave them out, and fed them up with his dairy cattle, and gift cows that had done labouring in the dairy, and other cattle, for which he paid tithe to the plaintiff, either in kind, or according to custom, and did not give out the same to grazing or fat cattle, but fed the same out upon the said farm and in the said parish for the winter-feeding of the said dairy and tithable cattle, which must have been fed with other meat, if not with turnips, and that no tithes were due for turnips so used and fed by the dairy and tithable cattle; that he yearly paid or satisfied the plaintiff for all other tithes, and had a discharge in *November 1702* in full till *Lammas*, except for the turnips then in the ground, which he insisted were not tithable, having sown the same with an intention to spend them for the purposes aforesaid, and not otherwise; that the said crop so sown, fed, and given out in the said year was not worth above 20 s.

After long debate, and the court having been attended with precedents, it was ordered and decreed, that tithes for turnips drawn and severed from the ground, and given to dairy and milch cattle, though upon the farm, and within the same parish wherein the same cattle were kept, are due; and that the defendant *Stopher* should forthwith pay to the plaintiff the sum of 18 s. for the tithes of nine acres of turnips by him or his order pulled and severed from the ground in 1702, and given to his dairy cattle in the said parish of *Spexhall*, with his costs, to be taxed by the deputy remembrancer of this court.

Tithes shall be paid for turnips drawn from the ground and given to milch cows, though in the parish in which the turnips grew, and the cows were milked. So, *Ringstead v. Young*, 1 Wood's Decrees 510.

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H. 4 Ann. A. D. 1705. Scac.

Drake v. Brooking. [Decree-Book 529b.]Good tender
what.

THE defendant tendered five pounds to the plaintiff, desiring him to take his tithe thereout. The court declared it to be no good tender.

H. 5 Ann. A. D. 1706. Dom. Proc.

Harrington v. Horton. [1 Br. P. C. 140.]

In a suit for tithe-hay, the defendants, by their answer, only set up several *modus*es under the name of *strew* tithes; an issue in this case proper to try, whether the *modus*es insisted on by the defendants, in their answer, have been time out of mind paid and payable for and in lieu of tithe-hay in kind.

THE manor, demesne lands, and parsonage of *Bedminster* and *Ratcliff*, in the county of *Somerset*, have immemorially belonged as a corps to the prebendary of the prebend of *Bedminster* and *Ratcliff*, in the cathedral church of *Surum*; and having been usually leased out for lives, were, for above 100 years, held by Sir *Hugh Smith* baronet, and his ancestors, as lessees thereof; who had besides, a very large estate of inheritance, lying within the impropriation.

In order to ground an exemption from the payment of tithe-hay in kind, the *Smiths* agreed with their tenants, to accept a yearly composition for the tithe-hay, arising out of their respective farms, amounting in the whole to 3 l. 14 s. 5 d. payable yearly, on *Good Friday*; but such of the lands held by those tenants, as belonged to the prebend, were not comprehended in this agreement, and were therefore left at large, to pay their tithe-hay in kind.

These compositions were generally paid the greatest part of the time that the *Smiths* enjoyed the parsonage, but there were sometimes small variation in them, at other times the tithe in kind was paid, and sometimes money to the full value of the tithe.

On the death of Sir *Hugh Smith*, the plaintiff's father, being then prebendary of the prebend, became seised of the parsonage; and in the year 1698 he granted the same to the plaintiff for three lives.

In *Easter* term 1700, the plaintiff exhibited his bill in the court of exchequer against Sir *John Smith*, the son and heir of Sir *Hugh*, and also against the defendants as his tenants, for the recovery of his tithe-hay, and the arrears from the time of his grant. To this bill

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bill the defendants, by their answer, denied tithe-hay in kind to be due, and set up the several sums, so payable by composition, as so many *modus*es, in lieu of tithe-hay, under the name of *strew* tithes; but the defendant Sir *John*, in his answer, set forth a paper which he found among his father's writings, relating to the profits of the parsonage, in which was the following article: "*Item*, There is a duty paid there in lieu of tithe-hay, called *strew* tithe, and it is due upon *Good Friday*, for which there is extant a rental of the particulars, what is to be paid out of every tenement, and out of divers particular grounds, which if they that hold them refuse to pay, then they must pay tithe-hay; and, if it can be all gathered, it will amount *per annum* to about 3 l. 14 s. but it is now difficult to be gathered."

On the 22d of *June* 1703, the cause came on to be heard, when the court decreed the defendants, the occupiers, to account with and satisfy the plaintiff for the value of their tithe-hay, and the arrears; and the usual directions were given for taking such account.

From this decree the defendants appealed to the House of Lords, contending, that an issue ought first to have been directed, to try whether tithe-hay in kind was, of right, due or payable within the parish. That the respondent's father, for 20 years and upwards, and Sir *Hugh Smith* and his ancestors, for above 100 years before, received tithe-corn, and all other tithes in the parish; but forgot, for all that time, to ask for so valuable a part, as the tithe of hay; which, if it had been really due, seemed very improbable, and scarce to be credited. And though many debts at law are lost by length of time, and a demand is, in most cases, necessary to preserve the right to a duty; yet, the only foundation of this decree in equity was the length of time, without any demand, so that the laches of the respondent's ancestor, which ought to be for the advantage of the appellants, turned out to their manifest prejudice.

On the other side, it was insisted, that tithes in kind are due of common right; and that there was no proof in the cause sufficient to support the *modus*es, as laid in the answer; for tithes in kind were proved to be paid for some of the lands, alleged to be covered by these *modus*es, and as to the other farms, the customary payments were proved to be different from those mentioned in the answer; and some of the lands were destitute even of the pretence of a *modus*. And, as to the objection, that there ought to have been a

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But, after hearing counsel on this appeal, it was ordered and adjudged, that the decree complained of should be so far reversed, as, that the several issues should be tried in the proper county, at the next summer assizes; whether the several *modus* insisted on by the now appellants, in their answer in the court below, have been time out of mind paid, and payable, for and in lieu of tithe-hay in kind; and that the court of exchequer should proceed upon the issues directed as should be just; and, if any difference should arise between the parties in settling the issues, it was ordered, that they should apply to Mr. baron Price, to settle the issues so to be tried.

Pursuant to this order, the several issues were tried, and a verdict being given for the defendants, the appellants, they were decreed to account for the arrears of the *modus*.

H. 5 Ann. A. D. 1706. Dom. Proc.

Chamberlaine v. Newte. [1 Br. P. C. 157.]

The tithe of corn, ground in an horse malt mill, is a personal tithe, and due only where it has been paid within 40 years before; and not payable by the tenth toll-dish of the corn ground, but by a tenth part of the clear profits, over and above all incident charges.

9 Vin. Abr. 39. pl. 5.
1 Eq. Caf. abr. 366.
pl. 3. S. C.

NEWTE was rector and incumbent of the portions of *Pitt* and *Titcombe*, in the borough and parish of *Tiverton*, in the county of *Devon*; and was entitled, as such, to tithes of corn, grain, wood, and all other great tithes.

About the year 1693, the mayor and burgesses of *Tiverton* erected a mill, for grinding malt by horses, within one of the said portions, and on 8 May 1699, they demised the same to the defendants for three years, from *Midsummer* then next, at the rent of 30*l.* per annum.

The lessees refusing to pay, or compound with the plaintiff, for any tithes in respect of the malt ground at this mill, he in *Michaelmas* term, 1704, exhibited his bill against them in the court of exchequer, praying an account and satisfaction of such tithes. The defendants by their answer insisted, that no tithes were due.

On 20 February 1705, the cause was heard and debated, and the court decreed that the defendants should account with, and satisfy, and pay unto the plaintiff, for the value of the tenth toll-dish

dish of all corn and grain ground at the said horse malt mill, for the two first years, in the bill mentioned, *viz.* from the 8th of *May* 1699, to the 8th of *May* 1701, and should also pay the costs of the suit. 1706.

From this decree the defendants appealed to the House of Lords; insisting,

1. That the tithe of a horse-mill is a personal tithe, for there is no natural increase from it, but only a profit arising from the invention of a machine, and the labour of a man and horse; and if it is personal, the same can only be for the tenth of the neat profit, deducting all charges.

2. If a personal tithe be due for such mill, it is only due where personal tithes have been by custom paid for 40 years before the statute of 2 & 3 E. 6. c. 13.

3. Though the appellants only took 2d. a bushel for grinding, yet the respondent did not prove any custom, nor the value of the tenth toll-dish, nor any other toll to be taken by the appellants.

4. That the tenth toll-dish would be more sometimes than the whole proprietor's gains, considering the expence of erecting and repairing this mill.

5. That the corn will pay tithe twice, for that most of the corn that was so ground, was grown within the same parish, and so the tenth paid to the respondent in the field; and if any was ground that grew elsewhere, the same did in like manner pay the tenth to the incumbent where it grew.

6. This decree will introduce a new sort of tithe, and will affect a great many people in *London*, where there are many such mills, and some thousands of them are in other parts of the kingdom; and if this decree be affirmed, they must all pay tithes.

On the respondent's part, it was insisted,

1. That tithes were due both by the canon and statute law, for newly-erected mills; that tithes were by the canons due for all mills; and by *Articuli Cleri*, c. 5. for newly-erected mills, which expressly provides, that no prohibition shall lie in such a case.

2. That there had been from time to time several resolutions and decrees for tithes of mills.

3. That the rest of the mills within the respondent's portions, had all along paid, and did still pay, tithes for the same; and every *modus* for a mill proves tithes to be due, if they were not discharged by such *modus*.

4. That it was a predial tithe, and the tenth toll-dish payable for the same; and so were the canon, custom, and usage of this kingdom.

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5. That this was not a double tithe, for it was paid by different persons, and for different purposes; viz. in the first case, by the owner of the corn; and in the second case, by the owner of the mill.

This case was heard at the bar of the House of Lords, *Monday 20 January 1706-7*, and upon some debate in the house, the consideration, if tithes predial, mixt, or personal, were due for such a mill, and if any due, in what manner payable, was referred to the judges; who, after several adjournments, attended in the house on *17 February* following, and all the judges of the *king's bench* and *common pleas* (except justice *Powell*) were of opinion unanimously, that the tithes due for a newly-erected malt-mill was a personal tithe only; and chief justice *Holt*, and chief justice *Trevor*, that there was no tithe due at all for such mill, because a personal tithe was due only where it had been paid within 40 years before, according to the statute of 2 & 3 *E. 6. c. 13. f. 7.* upon which the lords reversed the decree of the *exchequer*, but ordered, that Mr. *Newte* should be paid the tenth part of the profits, &c. deducting all charges and expences, as reparations, &c. and that the appellants should account with him in the court of *exchequer* for these profits, &c.

Monday, 17 February 1706.

Upon due consideration of what was offered by counsel, and upon hearing the judges, it was ordered and adjudged that the decree complained of should be reversed, and that the plaintiff in the court below, *John Newte* (the respondent), should recover his tithes of the said mill, in the nature of personal tithe only; that is to say, the tenth part of the clear profits arising from corn ground in the said mill, over and above all incident charges; and to that end, an account was to be taken of the profits of the said mill and charges for the time past, within the time of the plaintiff *John Newte's* bill in the *exchequer*, and since; and that the said tithes should so continue to be paid for the future; and it was ordered that the said court of *exchequer* should cause the said account to be taken, and what should be found due thereon, paid accordingly.

N. B. Dodd was of opinion with the judges of *B. R.* and *C. B.* and in judgment against his own client.

[The following account of lord *Holt's* argument in the House of Lords in this case is extracted from his Manuscript Reports above referred to.]

This

This cause being argued at the bar, the lords referred the consideration of two points to the judges of the two other courts.

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1st, Whether any tithes were due for a new mill?

2d, What kind of tithes, whether predial, personal, or mixt?

We were all of opinion, that tithes ought to be paid for a new mill.

2dly, All were of opinion, but justice *Powell* (who held the tithes were predial) that the tithes were personal, and not predial; the reasons that I urged are as follows:—

As to the first, that no tithes ought to be paid for a new mill, it is by authority no less than an act of parliament, called the statute of *Articuli Cleri*. The clergy having by a provincial canon made by *Robert Winchelsea* archbishop of *Canterbury* conceived that they had a right to have tithes of mills, did complain that prohibitions were granted, where suits were for tithes of new mills, upon a suggestion, that for those mills tithes were never paid. It was therefore enacted, that for such mills no prohibition should ever be granted. Now, if the remedy that any man hath either to secure or recover his right be taken away, that is an establishment of the right against him. Therefore upon such a suggestion no prohibition should be granted, but liberty was left to the clergy to sue for tithes of new mills.

But in the next place these tithes for new mills are not predial, but personal. Predial tithes are not payable, but of the produce of the earth that is annually renovant, as hay and corn. It is very true, that corn doth not grow without sowing, nor is the grass made into hay without labour: yet, in regard that it is natural for the earth to produce the corn after it is sown, tithe is due thereof: and so for the hay; that is not the produce of the earth without labour: yet, for that labour which is bestowed in the making of hay, is the occupier of the soil discharged of the after-pasture; and, by the custom of many places, of the aftermath. But the profits of mills do arise in no sort by nature, but wholly by labour and industry; therefore the tithes are merely personal.

2dly, If the tithes of mills were due of common right, no custom could be sufficient to discharge those mills which are ancient from the payment of tithes. For no layman can by the law of the land prescribe to be discharged of tithes, nor can any custom be alleged in any place to discharge any of the laity from any manner of predial or mixt tithes. But such a prescription to be discharged of tithes for ancient mills is allowed. 3 *Bulstr.* 212. *Jakes's case*, and

1706. 1 *Rel. Rep.* 405. *Coke* holds them to be personal tithes, though in 2 *Inst.* 622. he is doubtful what kind of tithes they were, and concludes he is not able to determine, not having had any experience therein. If they are predial tithes, then if the soil be discharged of the payment of them, because they came to the crown as abbey lands, then would a new mill that is built thereupon be discharged, which is not so. *Cro. Jac.* 429. yet held that a *modus* for the ground shall be also a discharge of mills newly erected, 2 *Inst.* 490. Which cases do not well agree. But *Mich.* 26 *Car.* 2. *Hughes v. Viscount Hereford*, a prohibition was granted for suing for the tithes of an old mill that never paid any.

3dly, This being a new mill, it is impossible to entitle the parson to the tenth toll-dish, when the miller is not entitled by law to have from his customers any one dish.

For first, No toll in any case whatever is due, but it must be by grant or prescription. 2 *Inst.* 220. *Cro. Eliz.* 558. 591. *Heddy v. Wheelhouse*. And for toll of mills, it did commence in this manner, that where the tenants of manors hold of the lord to grind at his mill, there, the lord prescribes to have toll for the same. *Co. Entr.* 641. and *Rast. tit. Secta ad molendinum*. The quantity of the toll is more or less according to usage. The stat. 31 *E.* 1. *Rast. tit. Weights and Measures*, none can have more than a 20th or 24th part for toll; but a man may grind, or be forced to grind, for less. Some may object the recital in a consultation, *Regist.* 48. for there, a consultation recites a suit for so much corn for the tithe of a mill newly erected, which shews that the tithe was to be paid in corn, and that was to be understood in a toll-dish. *Respons.*—No doubt, *prima facie*, he may sue for it, if it be a new mill; and if he do contract to have toll of corn, he must have it: but, still that is no argument that it is a predial tithe: but, if he takes by a toll-dish, it does not follow that he shall have the tenth toll-dish without deducting for the expence.

Now, suppose these tithes to be personal; yet, they are not within the reach of 2 & 3 *E.* 6. because they are not due by custom, but by act of parliament; and though in their nature they are personal, yet they have some resemblance to predial. The canon does not oblige, unless received and submitted to. Personal tithes universally are required by the canon, but not due by the law of *England*, but only in those places where the canon hath been submitted to.

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H. 5 Ann. A. D. 1706. Dom. Proc.

Pole v. Gardiner. [1 Br. P. C. 214.]

THE parish of *Eckington*, in the county of *Derby*, of which the plaintiff and his father had been rectors for upwards of sixty years, consists of a town called *Killamarsh*, and of four quarters called by the names of *Spinkill*, *Mosbrough*, *Eckington*, and *Troway*; and for time immemorial there have been, within this parish, certain yearly *modus*es, rates, or real compositions, in lieu of tithe-hay, viz. 12 d. an acre for all low meadows, and 8 d. an acre for all high meadows, (except in *Troway* quarter), for every year that the same were respectively mowed for hay; and for *Troway* quarter several small sums for every farm, amounting to about 110 l.

Twelve-pence an acre for low meadows, and 8 d. an acre for high meadows, in lieu of tithe-hay, held to be good *modus*es.

The defendant being possessed of lands in the town of *Killamarsh* and in *Spinkill* quarter, the plaintiff, in *Hilary* term, 1704, exhibited his bill against him in the court of *exchequer*, for an account and satisfaction of tithe-hay in kind, to which the defendant, by his answer, insisted upon the said antient *modus*es of 12 d. and 8 d. an acre, and that the same had been paid time out of mind in lieu of tithe-hay, and so accepted by the plaintiff, and all his predecessors, rectors of the said parish.

The cause being at issue, several witnesses were examined on both sides, and being heard on the 23d of *February* 1705, the court took time to consider, till the 23d of *June* 1706, when they declared, that the said payments of 12 d. and 8 d. an acre were no *modus*es, but temporary compositions, and that tithe-hay ought to be paid in kind for those lands, for which the said compositions were alleged to be payable, and therefore decreed the defendant to account with and satisfy the plaintiff for his tithe-hay, with costs.

From this decree the defendant appealed to the House of Lords; insisting, that the *modus*es were good in law, having been inviolably observed, and being fixed and certain, and what might be permanent; that there was not any rule in law to stint or limit the value of *modus*es; they were all originally contracts proceeding from composition real, which were frequently made till the statute 13 *El. c. 20.* which was above 350 years after the time of *Richard I.* That the owner of the parish might have endowed a church with more than the value

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value of the tithes, if he had thought fit, or might have contracted for twenty times less than the value; and in this, and most other cases, an inviolable usage is the sole evidence of right, when, by length of time, no account of the reason or beginning of the usage can be given; and therefore it is called a prescription. That the reason given for making this decree was, that the *modus*es in question were too great, or near the value of the tithe in kind: for that in the time of king *Richard I.* which was accounted the time of memory, 12 d. or 8 d. might be the value of the inheritance of an acre of meadow. But, according to this reasoning, a farthing an acre would scarce be adjudged a good *modus*; although there were late judgements of the court of *exchequer*, which confirmed 4 d. an acre for marsh land in *Kent*, and some which allowed 6 d. an acre in other places. That it was evident, both from the reason and the usage of the alienation office, that, in ancient times, meadow lands were of much greater value than of late years, which was owing to the modern invention of improving other lands, so as to bear hay: that most parsons quarrelled with a *modus* of 12 d. or 6 d. for a farm of 20 l. or 30 l. *per ann.* and by the unwariness of ignorant tenants, in making small alterations, got them set aside; so that within few years past, more *modus*es had been broken than for many ages before, while very few had been complained of, which were half, or near the value of the tithe. But, if this decree stood, several hundreds of the parishes would be unhinged in all their inviolable *modus*es and manner of tithing, and a multiplicity of suits and endless confusion would be created throughout the kingdom.

On the other side it was contended, that the tithe-hay in kind is to be paid to every rector, of common right, unless some ancient *modus* be payable in lieu thereof; but that the sums pretended to be *modus*es in this case, could only be temporary agreements or compositions, by reason of their largeness; for, in ancient times, when *modus*es were introduced, the sums of 12 d. and 8 d. were of much greater value than the hay of a whole acre. That there were several instances in proof in this cause, both in the time of the respondent and his predecessors, when sometimes the parishioners had refused to pay, and at other times the incumbent had refused to receive, these sums of 12 d. and 8 d. an acre; and, at all those times, tithe-hay had been paid in kind; that in all the neighbouring parishes, the rectors usually compounded with their parishioners for the tithe-hay, at the like rates of 12 d. and 8 d. an acre, yet

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they had the tithe-hay paid them in kind, whenever they thought fit, without any pretence that these payments were *modus*. That, considering so small a sum as 11 s. was paid for tithe-hay of *Troway* quarter, containing 100 acres, and so great a sum as 12 d. and 8 d. for every acre of the other quarter of the parish, no other reason could be given for the difference, but that one was an ancient *modus*, and the other a later composition.

But, after hearing counsel on the appeal, it was ordered and adjudged, that the decree should be reversed; it appearing to their lordships, that the appellant had proved the *modus* insisted on by his answer; and that the respondent's bill in the court of exchequer should stand dismissed, but without paying any costs to the appellant; his solicitor and agent consenting, at the bar of the house, to waive such costs.

M. 5 Ann. A. D. 1706. Scac.

Pemberton v. Beckwith. [Dodd's MSS. Rayn. 110.]

UPON a tithe bill it appeared, that the defendant had shorn his sheep, and laid the wool up in an heap, and set eight fleeces for the plaintiff; and when his tithe-gatherer came, told him, there was the tithe, but would not let him either break up or tell the heap, and the man took them, but said he took them in part, and that they were not his master's full due. Also, as to the lambs, the defendant had a field in another parish, and took out some lambs for that, and then the rest were tithed; but the defendant took out two, and bid the parson's man take out a third, for his tenth lamb; but he insisted he ought to take a second, yet he took a third, but said it was not right, and his master would sue.

Fraudulent manner of tithing, distinguished from an unequal manner.

Upon the hearing, the court decreed for the plaintiff, and that the wool and lamb so taken should go but in part, and be allowed upon the account as part only, and is not like the case where corn is tithed unequally, and the tithe taken; there, the parson shall be bound, and cannot afterwards falsify, or take only in part. *Quare* the diversity; but so asserted by the chief baron *most vehemently*.

1708.

H. 7 Ann. A. D. 1708. Dom. Proc.

Mickleburgh v. Crisp, Clerk. [1 Br. P. C. 278.]

A large common extends itself into several parishes, and by custom the owners of cattle, fed upon the common, pay tithes of such feeding to the parson of the parish where they respectively live, and not to the parson of that parish in which the cattle occasionally feed; held to be a good custom.
 Vin. Abr. 43. pl. 6.
 S. C.

THERE being a large open and uninclosed common, of about 300 acres, called *Micklefenn*, lying between and extending itself into the several parishes of *Kirby-cane*, *Stockton*, *Gelfton*, *Ellingham*, and other towns in the county of *Norfolk*, the inhabitants of the several parishes, bordering upon this common, had, for time immemorial, and in order to prevent multiplicity of suits, permitted a sort of inter-commoning between one another, upon all parts of it; and accordingly their cattle were driven and fed thereon promiscuously.

This right of common was deemed to belong to the respective farms in each town, and taken to be part of those farms; and the owner of the cattle so fed always paid the tithes thereof to the parson of that parish, in which their farms were situated; and these tithes, of consequence, became larger, by reason of the right or privilege of feeding upon this common.

Mickleburgh rented one farm in the parish of *Kirby-cane*, and another in the parish of *Stockton*; and he constantly paid his full tithes to the respective rectors of those parishes, without any abatement, in respect of his feeding his cattle upon the said common. He also occupied five acres of meadow, in the parish of *Ellingham*; for which there was payable a *modus* of 2 d. an acre; and which had accordingly been paid, or tendered to the plaintiff, as rector of that parish.

But in *Easter* term 1707, *Crisp* exhibited his bill in the court of exchequer against him, for tithe-herbage of this meadow ground; and also, for the tithe of the feed of his cattle on the said common, called *Micklefenn*; suggesting, that he the plaintiff was well entitled to those tithes. To this bill *Mickleburgh* put in an answer, and thereby insisted on the *modus* of 2 d. an acre for the meadow ground, which he was ready to pay; but as to the other demand, he stated, that the inhabitants of the respective parishes adjoining to the common had, time out of mind, paid tithe for their cattle fed thereon, to the incumbent of the parish, where the owner of such cattle lived; and where, in the winter season, they were kept; that he had paid tithe for his cattle fed upon the said common, to the incumbent of *Kirby-cane*, in which parish he lived, and to the rector

rector of *Stockton*, where his other farm lay ; and that he had two parcels of *dole* land in *Gelston* common, where he had a right to feed cattle, and cut alders ; but could not come at those lands, without driving over that part of the common called *Micklefenn*, which lay in the said parish of *Ellingham*.

On the 21st *July* 1709, the cause was heard ; when the court decreed, that the defendant should account for the tithes of his cattle fed upon that part of *Micklefenn* common which lay in the parish of *Ellingham* ; and also for the *modus* of 2 d. an acre, for his meadow land, in that parish ; there being proof, that the cattle were driven upon that part of the common that lay in *E*.

From this decree the defendant appealed to the House of Lords ; insisting, that tithes had never been paid, nor were any due to the respondent, as rector of *Ellingham* ; for the appellant's cattle fed upon that part of the common called *Micklefenn*, which lay in the said parish ; and therefore, the appellant ought not to have been decreed to account for such tithes ; for in that case, he would pay his tithes twice over ; and such payment would create perpetual suits and controversies, as well between the parsons, as the parishioners of the said several parishes. And as to the *modus* of 2 d. an acre, the appellant never contested, or denied payment of it ; but, on the contrary, was always ready and willing to pay it ; and that, therefore, in this respect, the bill ought to have been dismissed, with costs.

To this it was answered, that the appellant's cattle, for which the tithes were decreed, were dry, barren, and unprofitable cattle ; and not by law tithable to the minister of the parish where the owner lived, for the time they were fed in the respondent's parish ; but to the respondent, as minister of the parish where they were fed ; and therefore the suggestion of paying double tithes was groundless. That if the respondent should not have tithes for the feed of these cattle, upon the lands within his parish ; the herbage of all the pasture land therein might be eaten by the cattle of strangers, without his receiving any satisfaction for the same ; and there would be a *non decimando* for the feed of the appellant's cattle, during the time they were fed in the respondent's parish ; because, for that time, the minister of the parish, where the appellant lived, could have no pretence of right to such tithes.

But after hearing counsel on this appeal, the question was put, whether the decree should be reversed ; and being resolved in the affirmative, it was ordered and adjudged, that the decree of the court of exchequer, in the appeal complained of, should be reversed ;

Decree reversed.
Journals,
19 vol 63.

1708. verfed; because the custom, that every farmer should pay tithes to the rector where he lived, was good, there being no inclosure; and that the plaintiff's bill in the court of exchequer should be dismissed, without prejudice to his right to the *modus* of 2 d. an acre for the five acres of land in *Ellingham*.

Tr. 7 Ann. A. D. 1708.

Hall v. Filtz. [MSS.]

1 Wood's
Decrees
510. S. C.

THE defendant insisted no tithe was due for the second crop of turnips, the same being sown for meliorating the soil against the next year's crop; nor for agistment of sheep on turnips for the same reason. Decree to account for both.

Tr. 8 Ann. A. D. 1709. Scac.

Smith v. Johnson. [Decree-Book.]

A custom in
parcel of a
hundred to
be discharg-
ed of agist-
ment tithe
is void.

TO a bill by the rector of *Bishop Wearmouth* in the county of *Durham*, for an account of all tithes, both great and small, within the parish, the defendants as to agistment tithe, pleaded, that the said parish is parcel of the hundred or ward of *Easington*, in the said county of *Durham*; and that, by ancient custom within the said hundred, the owners, tenants, and farmers, of any lands and tenements within the said hundred have been, and ought to be discharged from the payment of tithes for all barren and unprofitable cattle bred, fed, or depastured, or for or in respect of the agistment or depasturing thereof, or of any other cattle in or upon the said lands or ground, or any part thereof; and that accordingly no tithes had at any time been paid for any such barren cattle, or the agistment or depasturing of the same, or of any other cattle, within the said hundred; for that the rector of the said church had enjoyed glebe lands and other tithes and profits yielding a competent reasonable maintenance and subsistence for him and them, without the tithes for barren and unprofitable cattle, or agisting or depasturing the same, or any other cattle, amounting to 300 l. *per annum*, and then to 400 l. and they insisted that they were exempt from the payment of the said tithes.

The

The court declared, that the said custom, if any such there were, was void in law (z), and therefore overruled the same.

And as to tithes demanded for sheep bought in after shearing, and wintered and sold, or killed unshorn, they ordered the defendants to account for the same.

1709.

Tithes decreed for sheepbought after shearing-time, and sold or killed unshorn.

Tr. 8 Ann. A. D. 1709. Scac.

Wright v. Elderton. [Decree-Book, fo. 149. 250.]

BILL by the vicar of *Stepney* for the tithes (*inter al.*) of milk and pigs, or some rate, *modus*, or composition in lieu thereof, and also for the tithes of turnips. The bill charges, that the defendant pretends that the plaintiff is not entitled to tithes in kind, but to some *modus* in lieu thereof, and that no tithes were due for turnips, or at least, if any, it was a sum certain for each acre, and but 6 d. due for each cow, and 1 s. 8 d. for each sow; which sums the plaintiff would have accepted in case the defendant would pay the same.

A *modus* of 6d. for every cow in lieu of the tithe of milk is due to the parson of the parish where the cows are kept, though milked in another parish. So of pigs, though the sow farrows in another parish. Vicar not entitled to the tithe of an after-crop of turnips, where he is neither endowed with such tithe, nor has been in the perception of it.

The defendant, in his answer as to the milk, insisted, on the *modus* of 6 d. for each cow in lieu thereof; and as to the pigs said, that he had never known any tithes paid for them; and as to turnips, he admitted that the tithe of them was due, when sown as a first crop, and no other tithes paid for the same ground that year; but he said, that when corn had been sown in any year in the parish, and tithes paid for the same, after the rate of 4 s. or 5 s. an acre for the same, according to the ground sown, and the same land was afterwards, in the same year, made to produce a crop of turnips, no tithes were payable for the same, nor had any been before demanded; it being very unreasonable that tithes should be paid twice for the same ground. He then set forth the number of cows he had kept; but insisted, that for the cows he had kept on a farm called *Red Lion Farm*, being always milked in *Whitechapel*, he ought not to pay tithes, the farm-house being in the parish of *Whitechapel*, and he having paid tithes for them to the rector of that parish. He confessed, that in the year 1703, he had sowed

(z) There is a short report of this case in lord chief baron *Dod's* manuscripts. The court resolved, he says, 1st, That this is not a good *modus*, and grounded their opinion on *Hicks and Woodeson*, (*supra* 550.) 2d, That the defendant proved no tithe paid in the hundred; but, as to the maintenance, he examined only to this parish, and not to all the other parishes; which the court held naught; for the whole hundred must be discharged; because in this parish there is a sufficient maintenance, *non constat* there is so in the whole hundred. *Lovell* b. contr. against the other three barons.

1709.

33 acres of land with turnips, part whereof he had sold, and with the remainder had fed his cows.

The court ordered the defendant to pay for the tithes of all his milch cows, as well those kept on *Red Lion Farm* as those in the parish of *Stepney*, at the rate of 6 d. a cow yearly, although the same had been milked in the parish of *Whitechapel*; and also 20 d. yearly for every sow that had pigs which were at any time kept in the parish of *Stepney*, although such sows pigged in the parish of *Whitechapel*, and also the tithes of turnips of the first crop not fed. But as to the tithe of turnips sown after corn reaped, the barons were divided in their opinions, and took time to consider further of the same; and on the 8th of *December 1710*, when the cause came on to be further heard, the question was again argued by counsel, viz. the Attorney General, the Solicitor General, Mr. *Dodd*, and Mr. *Brydges jun.* for the plaintiff, and Mr. *Ettricke*, Mr. *Phipps*, and Mr. *Ward*, for the defendant.

The court was then of opinion, that tithes are not due to the plaintiff(a) for turnips sown upon land as an after crop, where corn hath been the same year cut, and tithes paid for the same; and thereupon ordered that the bill, as to the tithes for such turnips, be dismissed.

M. 9 Ann. A. D. 1710.

Smith v. Williams. [Decree-Book, fo. 245.]

Wood cut every ten years for husbandry purposes tithable.

BILL for tithes (*inter al.*) of wood. The defendant said he felled yearly, at 10 years growth, 5 acres of wood, worth 25 s. per acre, which he used in amending his hedges, and upon his land, and so was of no profit to him: that none of the plaintiff's predecessors ever demanded the tithe, nor did he know that any was due. Decree to account.

MSS.

In *Hil. 2 Jac. 2.* to a bill by a rector for tithes of furze and bushes, which were cut and made into faggots, and sold by the defendant; the defendant insisted that no tithe was due, they being cut to clear the ground, and prepare it for tillage and grazing. The bill was dismissed.

(a) It was resolved in this case, according to a manuscript report of it by lord chief baron *Dodd* in the possession of *Hargrave*, that the vicar having generally taken the tithe of turnips sowed, but not having had tithe of turnips sowed after the corn reaped, nor those paid to any person, *que le plaintiff n'avera eux*; for he appears not to have any endowment or possession of them: and cited *Barry* and *Bridges* case, impropiator of *Fulham* decreed accordingly. Note, *Price* baron, contra.—He shall be intended to be endowed of the whole, and not partially.

Tr. 11 Ann. A.D. 1713. Scac.

1713.

Nanton v. Clarke. [Decree-Book, fo. 91.]

THERE was a *modus* of a buck and doe yearly due to the rector in lieu of all tithes of *Letherington Park* in *Suffolk*. The greatest part of the park had been disparked, and only a small part of it had been kept up and inclosed for deer, sufficient to answer the *modus*. The rector brought his bill for tithes; the value of a buck and doe yearly was decreed to him in lieu of all tithes.

Where a *modus* of a buck and doe has been paid to a rector in lieu of all tithes of a park, tho' a very considerable part of such park be disparked, leaving however sufficient to answer the *modus*, the rector is not entitled to tithes in kind.—In a bill for the tithes of a park, the defendant insisted, that the land was very barren, and was stocked with a small stock of deer and conies, and some cattle, and that the tithes (if any) were of very little value, and that no tithes had ever been paid for the same. Tithes decreed, *Peck v. Dixon*, H. 6 W. 3. Decree-book, fo. 234 b. P. 7 W. 3. fo. 253.

Tr. 12 Ann. A.D. 1713. Scac.

Bean v. Lee. [Decree-Book, 2d July.]

THE plaintiff, as vicar of *Lidd*, by his bill, demands the tithes in kind of hay, lambs, pigs, turkies, hens, geese, calves, milk, honey, wax, and agiftments, &c. The defendants, by their answers, admit the plaintiff is vicar of the said parish, and is thereby entitled to all the tithes arising in the said parish (except the tithes of corn and grain), or to some rate, *modus*, or customary payment, in lieu thereof; and say they believe, and doubt not but to prove, that no tithes of hay, lambs, wool, calves, pigs, eggs, agiftment, or any other small or vicarial tithes, were ever paid, or ought to be paid in kind to the vicar of the said parish for the time being; but that there is, and time out of mind has been, a custom, usage, or *modus decimandi* in the said parish, that all the occupiers of marsh, meadow, and pasture land in the said parish have used to pay yearly, for all the said marsh, meadow, and pasture lands by them respectively used and occupied in the said parish, to the vicar of the said parish for the time being, in lieu and satisfaction of the tithes of hay, lambs, wool, calves, colts, pigs, eggs, honey, wax, fruit, agiftment, and all other small and vicarial tithes arising upon the said lands, the yearly rate or sum of 1 s. in the pound, and so proportionably for every greater or less sum than 1 l. according to the yearly rent of such of the said lands as are rented or letten at a full or rack-rent without fine, and according to the yearly value of such lands as are not letten, or

A *modus* to pay 1 s. in the pound on the yearly rent of rack-rented farms, and the yearly value of farms under-let, in lieu of vicarial tithes is bad. *Rayn.* 122. S. C. 3 *Burn's E. L.* 408. S. C. *Startup v. Dodderidge*, supra S. P. *Shapter v. Michell*, 2 *Wood's D. cr.* 13. *Rayn.* 126. and 3 *Burn's E. L.* 408. S. P. *Marrison v. Sharpe*, 2 *Wood's Decr.* 224. *Rayn.* 211. *Bunb.* 174. pl. 246. S. P.

1713. not letten at a full rent without fine as aforesaid.—The question was, whether this *modus*, as laid, were a good *modus* in law, or not?

Upon hearing counsel on both sides, and on full debate of the matter, the court was unanimously of opinion, that the *modus* in question, as laid and insisted on by the defendants in their answer, and stated by the case, was a void *modus* in law.

Tr. 12 Ann. A. D. 1713. Scac.

Bishop of *Norwich* and *Eachard* v. *Bucklea*. [Dodd's MSS.]

The bishop and sequestrator joining may maintain a bill for tithes.

UPON a demurrer to a tithe bill brought by the bishop, and *Eachard* as sequestrator, of the rectory of *Boaly* in *Suffolk*, the bill charged, that the bishop was bishop of the diocese; that the rectory is within it, and had been vacant so long; that the bishop sequestered it, and granted it to the other plaintiff. Resolved, 1st, That a sequestrator cannot maintain a bill. 2^d, That the bishop and sequestrator joining may maintain a bill. And accordingly the demurrer was overruled. *Vide supra* the case of *Berwick* and *Swanton*.

M. 12 Ann. A. D. 1713. In Canc.

Roffe v. *Harding*. [8 Vin. Abr. 598. pl. 31.]

Tithe is payable for furze, made into faggots and sold, but not for furze burnt, or used upon the premises. Rayn. 125. S. C.

BILL for a discovery of tithes of furze and payment thereof. The defendant, by answer, insists, that furze spent upon the premises is not tithable; and also that underwood and furze generally are not tithable in that parish, &c.

Plaintiff admits, that no tithes are due for underwood or furze spent upon the premises, but insists upon tithes of furze made into faggots, and sold by the defendant. That underwood or furze spent for firing or fencing of the premises is not tithable, but underwood or furze sold is tithable, cites *Moor*, 909.

In the proofs of the cause, there was some evidence of 1^d a-year paid, called smook money, in lieu of tithes or furze; but that not being insisted upon, by the answer, but a general *non decimando* for underwood and furze; Lord Chancellour *Harcourt* decreed defendant to account for tithes of furze made into faggots and sold, but not for furze burnt or used upon the premises, and defendant to pay costs.

M. 1 Geo. I. A. D. 1714. Scac.

Mason v. Watson. [Decree-Book, fo. 181.]

BILL for tithes. As to part of the demand, the defendant, by answer, tendered 10 l. with costs, to the time of the answer. At the hearing the court decreed a trial at law as to the other part, and reserved further directions. After the trial the court dismissed the whole bill, except as to the 10 l. which they decreed the defendant to pay to the time of the answer (inclusive) and no further; and that from the time of the tender the plaintiff should pay to the defendant the subsequent costs of suit, which subsequent costs were to be allowed to and deducted by the defendant out of the costs which should be taxed and allowed the plaintiff, so far as the same would extend, and the residue of the defendant's costs were to be paid by the plaintiff (b).

Tr. 2 Geo. I. A. D. 1716. Scac.

Keddington v. Adamson (c). [Decree-Book, 14th June.]

TO a bill by the lessee of the rector of *Stradisball* in *Suffolk* for tithes in kind, two of the defendants pleaded, in bar, an agreement made between them and the plaintiff's lessor, the rector, in *June 1711*, that they should retain their tithes for three years, paying so much.

A parol agreement with a parishioner to retain his tithes for three years is good.

A question was made, whether the above agreement, by parol, being for three years, were good in law, so as to bind the rector and the plaintiff; and, upon debating thereof, many reported cases relating to the same, were cited, and the cause was ordered to stand

(b) Where the defendant had, before the bill filed, tendered 5 s. on the account decreed, the court directed, that if in the taking of the account, the value of the tithe should amount to more than 5 s. the defendant should pay the costs of suit. *Taylor v. Hall*, M. 8 W. 3.

(c) *Bunbury* in his report of this case, says, that it was held by *Bury* and *Priest*, barons, that a composition, by way of retainer by parol, can be good only for one year, being by way of contract, but that a lease of tithes even for one year by parol, would be void. *Montagne*, baron, seemed to be of opinion, that an agreement between the parson and his parishioners, for a year, by parol, would be good, though not for life, being only an agreement, that he will not sue the parishioners for so many years for tithes. S. C. *Bush* 2. But see 4 *Bacon's Abr.* 54. notes, 5th edit.

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over to the next day; on which day counsel on both sides were again heard; and, after many arguments thereupon, it was ordered to stand further over, the court not being ready to give their opinion thereon; and on the cause coming on again, the court declared, that the agreement made with the above defendants for their tithes, for the three years, is good and valid in law: and ordered them to pay accordingly.

H. 3 Geo. I. A. D. 1716. Scac.

Benson v. Watkins. [Bunb. 10.]

Modus too near the value of the land disallowed; and defendant decreed to account for tithes in kind.

Bunb. 10. pl. 12.

Difference between a *modus* and a composition

Tithes for gardens. Turnips.

After-moath. After-pasture.

BILL by an impropriate rector for tithes. The defendant insists upon several *moduses*, viz. 5 s. an acre for wheat and rye; 4 s. an acre for summer corn; 3 s. an acre for meadow, &c. The court disallowed these *moduses*, and decreed the defendant to account, they being too rank, and too near the value of the land; especially as these *moduses* were supposed to commence when the land was at a much less value, and money at much greater.

It was said in this case, that the only difference between a *modus* and composition is, that the first is time out of mind, and the last only a late agreement.

All the garden ground in *England* shall pay tithes for different crops; *turnips*, when they are pulled, ought to pay tithe, though never so often sowed, and though upon the same land.

Tithes of *after-moath* shall be paid, but not tithes of *after-pasture*, unless by custom; but *quære* of these last points.

[*It does not appear from the Decree-Book, that either of these two last points could have been agitated.*]

Tr. 3 Geo. I. A. D. 1717. Scac.

Reynell v. Rogers. [Decree-Book, 18th July.]

BILL by the vicar of *Horsham*, in *Suffex*, for tithes in kind from *Michaelmas* 1714. The defendant said, that the vicar in 1709 entered into a composition with his parishioners, in consideration of being exempted from the poor's rate, and that he (the defendant) had paid his proportion of such composition to *August* 1715, about which time, which was about three weeks before hop-picking, the vicar gave notice that he would take tithe in kind; which notice he submitted was not binding upon him.

The

The plaintiff amended his bill, and stated, that there was no such agreement, and the defendant put in his answer, and insisted that there was such. 1717.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and the cause came on to be heard on the 1st of *December* last; when, on reading several depositions taken on both sides, and the said agreement, dated the 20th of *July* 1709, for three years; and on the defendant's counsel insisting, that the plaintiff had continued the said agreement after the expiration thereof till and for the said year 1715; and that the plaintiff had not given the defendant sufficient notice that he would take his tithe-hops in kind for that year; it was then ordered by the court, that the plaintiff's bill should stand dismissed. But upon petition it was ordered, on the 6th day of *December*, that the cause should be re-heard as to tithe-hops, upon payment of 5 l. costs: which costs being paid, and upon reading the answer to the amended bill, it was ordered by the court, that the said bill be, and the same was thereby dismissed (*d*), with costs to be taxed.

Tr. 3 Geo. I. A. D. 1717. Scac.

Ayd v. Flower. [Decree-Book, 27th July.]

BILL by the vicar of *Sturton*, in *Nottinghamshire*, for agistment tithes on lands called *The Cow Pasture* and *The Horse Pasture*; and on eighty cattle-gates in the *Upper Ing* and *Lower Ing*. The defendant said, that the vicar had a sufficient maintenance by an augmentation reserved and made payable to him by the dean and chapter of *York's* lease of the parsonage; that no agistment tithe had ever been paid, till within the last three years; that the *Cattle Pasture* and the *Horse Pasture* are commons without flint; that the tithe of wool and lamb, &c. had been usually paid to the vicar in full satisfaction of all tithes; and that the *Upper Ing* and *Lower Ing*

Meadow grounds which have paid tithe of hay, are not afterwards liable to an agistment tithe.

(*d*) It is said, *S. C. Bunbury* 15. that the bill was filed to compel the payment of tithe-hops; that the defendant insisted on a composition; that the plaintiff replied, that he had given notice to determine the composition, and to take the tithe in kind; but that as the composition was for all the small tithes, and the notice was only to determine it as to the tithe of hops, the bill was dismissed; for that a composition cannot be determined as to part, and continued as to the rest. And *Price* baron, said, that it is time enough to give notice to determine a composition before the reaping of corn and picking of hops, but not after.

1717. were every year mowed, and the tithe-hay paid to the impropriator; and that therefore no tithe was due for the depasturing of cattle on the after-math thereof.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and on reading the answer, and the counterpart of the lease from the dean and chapter of *York*, impropriators of *Sturton*, dated the 2d of *December*, in the thirty-second year of *Charles the Second*; also an ancient book from the register of the dean and chapter of *York* of the first presentation and endowment to the vicarage of *Sturton in the Clay* (e), in which presentation and endowment the said town of *Sturton* is called by the name of *Straron*, otherwise *Stretton in the Clay*, and which is dated the 30th of *June* 1460; also a book from the first-fruits office, entitled *Valor Beneficiorum* (f); and also on reading several depositions taken in the cause; and on full debate of the matter; it was ordered by the court, that the defendant should account with and pay to the plaintiff all the tithes due and in arrear for his dry, barren, and unprofitable cattle bred, fed, or depastured upon any grounds within the parish, other than in the *aftermath* or *after-grass* of such grounds which he had annually meadowed there, and whereof tithe-hay had or ought to have been paid in kind to the impropriators or their tenants for the time demanded by the bill; and it was referred to the deputy remembrancer to take the said account. And it was further ordered, that the defendant should pay to the plaintiff his costs of this suit, to be taxed by the said deputy remembrancer.

(e) It appeared by this endowment, that the vicar was endowed of all, and all manner of small tithes whatsoever. Bunb. 7.

(f) Agistment-title was not mentioned in the *Valor* among the other tithes there enumerated: but, in answer to that, it was said, that there were other tithes not mentioned there, which the defendant himself admitted to belong to the vicar. Bunb. 7.

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H. 4 Geo. I. A. D. 1717. Dom. Proc.

Austen v. Nicholas. [2 Br. P. C. 31.]

IN 1703, the respondent was inducted into the vicarage of *Shalford* and chapelry of *Bramley*, and thereby became entitled to all tithes, duties, and profits, belonging to the same.

The tithes of peas and beans set, drilled, sowed, or planted in rows, in garden-like manner, are small tithes, and the use of a plough, instead of a spade, after a new improvement, makes no difference.

The appellants *Robert* and *Elizabeth Austen* were seized in fee of the impropriation, and the great tithes of corn, grain, and hay; and the other appellants were their tenants.

The plaintiff, as vicar, was endowed of all the small tithes, and had for a long time received a composition of 3 s. 4 d. an acre, in lieu of the tithes of beans and peas, set and planted in rows and ranks, that had been hoed and weeded with the hand, where the ground had been turned up with the spade, although in the open fields; but, where the beans and peas had been set in rows and ranks, and hoed and weeded with the hand, where the ground had been turned up only with the plough; the tithes of such beans and peas had been gathered in kind, by the impropriator, or his farmers.

Until about thirty years before the commencement of this suit, the ground in the parish was usually prepared for beans, peas, and roots, with plough and spade together; and, while this method continued, the impropriator never set up any right to these tithes, so that the same were enjoyed by the vicar; but the farmers and occupiers of some small parcels of land (not considerable about 20 years ago) having contrived a tin or iron plate to be annexed to the plough, the use of the spade was omitted; and thereupon the impropriators or their tenants first set up a pretence, that thereby the tithes of beans and peas became great tithes, and took the same accordingly.

In *Hilary* term, 10 *Anne*, the respondent brought his bill in the exchequer against one *Elliott*, a farmer of the great tithes, for the tithes of such plough-set beans and peas; and the court decreed *Elliott* to account for the same.

The plaintiff soon after brought another bill in the same court, against the defendants, for the small tithes arising from the glebe land, and to confirm the former decree; but pending this suit, *Elliott* brought his action of trover against the plaintiff, for taking

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tithes of peas which were set in rows and ranks, and weeded and hoed upon ground turned up with the plough, and upon the trial of that action (wherein the value of the tithes being agreed on, the only question was, whether the tithes belonged to the impropiator or the vicar ?) the plaintiff in the action obtained a verdict.

After this verdict, the cause against the defendants came on to be heard, on the 19th of *May* 1715 ; when the barons having admitted their decree against *Elliott* to be read (though he was not party to this suit, nor were the defendants parties to that) and rejected the evidence, verdict, and judgment, in the action of trover ; affirmed their former decree, and ordered the defendants to account with the plaintiff for the said small tithes (g).

From which decree the defendants appealed, insisting, that there were in this case two contradictory determinations of the same question ; the one in a court of equity, the other at common law : that the determination at common law ought to stand ; for that every man's freehold and inheritance ought to be tried and determined at common law ; or at least, that no decree ought to have been made without a second trial : that the court of exchequer, by allowing the former decree to be read, as an authority in the like case, though not under the denomination of evidence, did in effect found a decree against the appellants, on a proceeding which ought not by law any way to affect their right ; that by this means all the tithes of wheat, barley, &c. might be turned into small tithes ; forasmuch as wheat and barley were in many places sowed in furrows after the plough, and often times hoed and weeded with the hand : that the vicarage was never endowed with small tithes arising upon the glebe lands, nor had the vicar ever any possession of such tithes ; that this was a new case, and would, in consequence, affect all the impropiators in *England* ; for that this sort of husbandry of planting peas in rows and ranks after the plough, and weeding and hoeing the same, was found to be a great improvement of the crop : that the vicar having a right to peas

(g) In that cause the respondent also claimed the tithe of fish, which were bred in ponds. The court declared, " that the varying the manner of preparing the ground for setting and sowing from the spade, or spade and plough, to the plough alone, should not alter the right of the tithes, so as to entitle the impropiator to them, when the ground is prepared by the plough alone, although such peas and beans are set, sowed, and cultivated in the same manner as they were when the spade, or spade and plough were used for preparing the ground ; and that fish in a pond are not tithable without a custom.

planted in gardens, where the spade only was used to turn the ground (the same sort of husbandry being used in the open fields); and there being an old custom in the parish to pay 3s. 4d. an acre for ground turned with the spade, and planted with any sort of roots, the vicar had accordingly received such composition of 3s. 4d. as well for peas as roots; and it did not appear, by any proof, that the vicar ever collected tithes in kind of peas, planted after the spade; but that, on the contrary, only 3s. 4d. an acre had all along been paid him, for all trenched ground planted, whether with peas or roots.

On the other side it was contended, that though vicars sometimes (for ease of themselves and the parishioners) agreed to take a composition; yet it did not destroy the right they had to the tithes, either in kind, or according to a *modus*; but the old right continued, to take the tithes according to the ancient method of payment, when the time for which the composition was made was determined: that the vicar had, for time immemorial, received the tithes of beans and peas planted and managed in garden-like manner, as well after the plough as after the spade: that the court of exchequer only read the decree against *Elliott* by way of precedent, and regarded it as such, as well as other cases cited out of the law-books: that it was impossible the tithes of wheat, barley, &c. should ever be turned into small tithes, by means of this decree; for without a prescription, no claim could be made of such tithes by a vicar, let the ground be prepared or turned, or the seed sown or set, in what manner soever: that where the vicar did so prescribe, the refusing a single instrument, and still continuing the same crops and manner of husbandry, could not deprive him of that prescription; besides, the respondent claimed tithes of no other corn or grain set in rows or ranks, or otherwise sown in fields, but only of peas and beans; which plantation took its rise from the garden-culture of such crops: that upon hearing the cause, the appellants could not make it appear that the lands for which they insisted on an exemption of all small tithes, were glebe lands; or, that as such, or by any other means, they were legally discharged of tithes to the vicar; and therefore, the court decreed them to pay tithes of such lands: that this was no new case, there being precedents of the like nature in the court of exchequer: that without a prescription, the vicar could not claim; and with it, he was entitled to the improvement; but, if omitting an instrument in

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husbandry, could defeat the prescription, then the right of all prescriptions was at an end.

Decree affirmed,
Lords Jour.
20 vol. 583,
Bunb. 20.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed; and the decree therein complained of affirmed.

H. 4 Geo. I. A. D. 1717. Scac.

Bate v. Sprakling. [Bunb. 10.]

Tithes of
hop-poles
and milk.
2 Wood's
Deer. 86.
S. C.

IT was decreed by the court, that no tithe should be paid of hop-poles: that tithe-milk ought to be every tenth meal; and that in all cases where you do not make out some custom, you must pay according to the canon.

H. 4 Geo. I. A. D. 1717. Scac.

Anon. [Bunb. 22.]

IF there be a general demand of tithes, and a general replication put in; if the plaintiff upon the commission give notice, that he will proceed only as to such and such particular matters, it is as well as if the demand had been abridged in the application; but *quere*.

M. 5 Geo. I. A. D. 1718. Scac.

Anon. [Bunb. 28.]

Tender must
be before, as
well as by
answer, in
order to save
the defend-
ant his costs.

IF to a bill for tithes, the defendant does not shew a tender before, or make it in the answer, the plaintiff is entitled to an account, although the value be never so small: if there hath been a tender before, and a tender is also made by the answer, the defendant saves his costs: if the tender is only by the answer, he must account with costs; but *quere*.

H. 5 Geo. I. A. D. 1718. Scac.

Hanking v. Gay and others. [Bunb. 37.]

BILL for tithes. Defendants in their answers insisted, that the lands where, &c. were formerly belonging to the abbot of *Crowland*, which was one of the greater monasteries, dissolved by stat. 31 H. 8. c. 6. and therefore exempt; but do not say, that they were discharged, when parcel of the abbey lands, though not one of the orders which was discharged.

How an exemption of land from tithes, as belonging to one of the greater monasteries, should be laid in the answer.

And the defendants insisted, that constant non-payment was a sufficient evidence of an exemption; especially being coupled with being parcel of one of the greater monasteries.

The court unanimously decreed for the plaintiff in the present case; for that the proof was not full as to non-payment; and also, though the defendants say, that the lands were in the abbot's hands; yet they do not say, they were discharged in his hands; and the statute of 31 H. 8. c. 6. extends only to *such*.

H. 5 Geo. I. A. D. 1718. Scac.

Lloyd v. Small. [Decree-Book, 23d Feb.]

BILL by the vicar of *Epping*, in the county of *Essex*, for an account of all tithes and duties arising in the parish, except the tithes of corn and grain.

The defendants confessed, that the plaintiff was lawful vicar; but they denied, that he or his predecessors were entitled to any tithes or dues, other than those set forth in their answers.

The defendant *Small* confessed, that during the said year he had held the farm called *Bury Farm*, consisting of several quantities of arable, meadow, and pasture ground; and insisted, that there is a *modus* of 8 l. a-year payable in lieu of the tithes thereof. He also confessed, that he held the farm called *Cobb's Fields*, consisting of arable, pasture, and meadow ground; and insisted, that there is a yearly *modus* of 1 l. 10 s. payable in lieu of the tithes thereof.

The defendant *Chandler* confessed, that he held a farm, called *Parvell's Farm*, consisting of arable, pasture, and meadow lands, for which there is a yearly *modus* of 4 l. payable.

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The defendant *Parry* confessed, that in the said year he held a farm in the said parish, called *Redsdale Farm*, consisting of the same land, for which there is a *modns* of 1 l. 6 s. payable yearly.

And all the defendants set forth what tithable matters and things they had in the said year; and admitted, that they had not set forth their tithes in kind; but insisted, that the plaintiff was not entitled thereto, but only to the several sums of money which they said were, time out of mind, paid to the former vicars, and no other, in full of all vicarial tithes, and which sums they averred the vicar had received.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and on debate of the matter, the court was of opinion, that the said several sums of money insisted on by the several defendants to be paid by them respectively as *moduses* for the vicarial tithes of their respective farms are not good and legal *moduses* (*b*).

H. 5 Geo. I. A. D. 1718. Scac.

Lord *Arundel's* case. [12 Vin. Abr. 255. pl. 3.]

What evidence books of account, memorandums, &c.

BOOKS of account, *memorandums*, &c. of a preceding vicar, may be made use of, as evidence for his successor to support his demands, in case of tithes, &c. by *Bury*, chief baron, and baron *Price*.

H. 5 Geo. I. A. D. 1718. Scac.

Gregory v. Lutterell. [12 Vin. Abr. 255. pl. 3.]

Evidence to support payments, in cases of tithes, is allowed more extensively, than in any other case. 2 Wood's Decr. 114. S. C.

A PAPER 1639, signed, &c. to prove a composition for rabbits on *Brampton* burroughs, by the predecessor of the present vicar, &c. was read by the barons (*Page hæsitante*), though no direct proof that the defendant claimed under the person that signed it, the warren (that is, burroughs), &c. it appearing, that it was of an ancient date, that the estates mentioned in it were as defendant now had; and there being proof of the hand-writing of one of the wit-

(*b*) It is said, that it appeared by the defendant's answer, that the small tithes in kind demanded by the bill, did not amount to more in that year than the pretended *moduses*; and therefore the *moduses* were set aside. 3 Burn's E. L. 412, 413.

nesses,

nesses, &c. but afterwards held, that it was not sufficient to support plaintiff's demand for the uncertainty, as that there might be a warren at another place, or a piece of ground so called, or the composition might be for other tithes arising out of the warren.

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P. 5 Geo. I. A.D. 1719. Scac.

Earl of *Scarborough* v. *Hunter* and others. [Decree-Book, 4th May.]

BILL by the plaintiff, as impropiator of the parish of *Hart* in the county of *Durham*, claiming twelve-pence in the pound for all fish caught in the sea, and brought into the port of *Hartlepoole* and there sold, and the twentieth part of all fish so caught by the fishermen of the parish and sold elsewhere; all reasonable charges being first deducted.

The defendants admitted the plaintiff's title, and submitted the customs to the judgement of the court, whether they were good or not.

The plaintiffs replied; the defendants rejoined; and witnesses were examined on both sides; and on reading the depositions of several witnesses, and hearing what was insisted on by the plaintiff's counsel; and it being admitted, by the answer of the defendants, that by custom the inhabitants of *Hartlepoole*, who were owners of boats employed in the fishing trade, had usually paid to the rector or impropiator of the said rectory of *Hart* a customary payment of *one twentieth part, or twelve-pence in the pound* (after charges deducted), in lieu of tithe-fish, and of all other tithes and sums of money which became due for and in lieu of tithe-fish, and all other ecclesiastical duties and payments, by reason of the profits arising to the owners of such boats; but that such customary payments were not clearly appearing to the court, the witnesses of both sides disagreeing therein, it was by the court proposed to the plaintiffs to accept of twelve-pence in the pound, or a twentieth part of the clear gain (after all charges deducted), for the tithe of the fish taken by the defendants, without costs on either side (*i*).

Where-

(*i*) It is said, S. C. Bunb. 43. that although the plaintiff did not prove his custom as laid in the bill, yet by three barons against the chief baron an issue was directed to try, whether there was such, or any and what custom? although it was said, there never was an instance where either the plaintiff or defendant insisted on a *modus*, and did not prove it, that it ever went to a trial at law, it being essential to a *modus* that it be certain. It

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Whereupon the plaintiffs declaring their consent to accept of twelve-pence in the pound clear gain (after all charges deducted) for the tithe of the said fish; and the defendants also consenting to pay the same without costs on either side, and without prejudice; it was thereupon ordered and decreed by the court, by and with the consent of all parties, that the defendants should severally account with and satisfy the plaintiffs for the tithes of the fish by them respectively taken during the time in the bill mentioned, after the rate of twelve-pence in the pound for the clear gain arising by such fish, after all charges deducted.

Tr. 5 Geo. I. A. D. 1720. Scac.

Glanvil v. Trelawney. [Bunb. 70.]

Impropriator must be made a party to a bill brought against his lessee, to establish a *modus*.

WHERE a man prefers a bill to establish a *modus* against the lessee of the impropriator, he must make the owner of the impropriation a party; for this court will not bind the inheritance of any person, unless he is before the court.

[In this case the bill was filed by the impropriator himself. See 2 Wood's Decr. 128.]

Tr. 5 Geo. I. A. D. 1720. Scac.

Benning v. Douce. [Bunb. 26.]

How an exemption from tithes ought to be laid.

THIS was a bill for tithes. The defendant insisted, that the lands where, &c. were part of the homestead, which is part of the bishop of London's palace; and therefore exempt from payment of tithes; but did not lay it personally in the bishop; and this was allowed by lord chief baron *Bury* and baron *Price* against *Page*, to be well enough, because this exemption goes along with the lands; although it would have been better laid by way of formal prescription; as at law, that the bishop for himself, and his tenants, have

was also objected, that the custom was illegal as it was laid; for if it be a personal tithe as it was insisted upon, and as the court seemed to think it, then a double tithe may be payable, not only in another port where the fish is sold, but also where the fishermen inhabit. To which the three barons, against the chief baron, said, it was a good custom; for that one tithe may be paid by custom, and one of common right.

time

time out of mind, &c. And as to lands belonging to a monastery, they must set forth how the prescription is; but, where the land itself is exempt, it is discharged, in whatever hands it comes; and by the opinion of two barons against one (*in the absence of Montague*) the bill was dismissed.

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Tr. 5 Geo. I. A. D. 1720. Scac.

Bailey v. Peafely. [Bunb. 26.]

BILL for tithes—defendant stood out until a sequestration, and the bill was taken *pro confesso*. It was moved for the defendant, that upon paying the costs, the value of the tithes might be ascertained, and reduced either by the taxation of the master, or by the oath of the plaintiff himself; but the court would make no other order, than that the plaintiff should shew cause, why he should not consent to give his oath to the value.

In what case value of tithes is to be ascertained by the plaintiff's oath.

P. 6 Geo. I. A. D. 1720.

Dodson v. Oliver. [Decree-Book, 16th May.]

THE plaintiff, as rector of *Husterpoint*, in the county of *Suffex*, filed his bill (*inter al.*) for a discovery, account, and payment of the tithes of a water corn-mill, and for the great and small tithes of the farm and lands occupied by the defendant, according to the following rates, *viz.* every tenth toll-dish, or pint of corn, received by the defendant, for corn ground at the said mill; and the tithes in kind of corn, grain, hay, milk, and calves.

The defendant admitted, that he was occupier of the mill and farm in the bill mentioned; but insisted, that the mill, having been built beyond memory, was an ancient mill, and ought not to pay tithes; and that, for the other tithable matters, the plaintiff had, for the time demanded by the bill, received the tithes of his corn, grain, and hay, in kind; that he had, according to agreement, paid him tithes for the calves he had; and that as to the tithes of his milk, he had set out the tenth part in such manner as is stated in the answer. He confessed, that he had five persons in his family above sixteen years of age, but said, that he knew not whether any *Easter* offerings were due for them.

The plaintiff, by a special replication to the defendant's answer, admitted that the defendant had paid the great tithes of corn, grain,

1720.

grain, and hay, and therefore waived his right thereto, and discharged the defendant from the examination of witnesses concerning the same. The cause being at issue on both sides, and witnesses having been examined for both parties, it came on to be heard on the 23d day of *February* last, when, upon reading several depositions in the cause, the court directed it to stand over for further hearing, and it came on to be further heard this day, when the plaintiff relinquished his demands of tithes of calves.

The court, after reading several proofs, ordered the defendant to account for tithes in kind of his milk, for the time demanded by the bill, unless he could prove before the deputy remembrancer the time when the plaintiff sent a note to him in writing, signifying therein, that for the future he, the plaintiff, expected the defendant to set out the tithes of his milk upon every tenth meal, and that the plaintiff would fetch it away; and, in such case, the deputy remembrancer was ordered to take the account only from the time of the delivery of the said note. But as to the demand for the tithes of corn and grain ground at the corn mill, the cause was ordered to stand over for counsel on both sides to be heard on the point (*k*), and for the court to give their final opinion therein.

The cause accordingly stood in the paper the 4th of *May* 1721, and after hearing counsel on both sides, the court was divided in their opinions, which they gave *seriatim* (*l*), touching the tithes of the said mill, and neither party afterwards made any application to the chancellor for a rehearing before him and the barons; but on the 29th day of *November* 1721, the plaintiff, by his counsel, consenting in court to waive his further prosecution for the tithes of the said mill, it was ordered, that the defendant should shew cause why the deputy remembrancer should not be at liberty to proceed to take and state an account of the tithes of milk and *Easter* offerings, which order was made absolute on the 9th of *December* following.

(*k*) The question was, whether tithes of an ancient corn-mill, that had never paid tithes were payable or due of common right? S. C. Bunb. 73.

(*l*) The following opinions are taken out of the exchequer chamber minute-book, viz.

Mr. baron *Page*.—No tithes due for an ancient mill, for which no tithes have been paid; tithe of a mill is a personal tithe, and the defendant ought not to account.

Mr. baron *Montague*.—That the defendant ought to account for the tithe-mill by paying the tenth toll-dish.

Mr. baron *Price*.—The same opinion.

Ld. chief baron *Bury*.—Of opinion the defendant ought not to account. The court divided.

P. 6 Geo. I. A. D. 1720. Scac.

Jordan v. Colley and others. [Bunb. 61.]

BILL by a rector for tithe-wood, in the parish of *Little Wanlock*, in the county of *Salop*, as it had been paid time out of mind in that parish, against the defendants, as vendees of Sir *William Forrester*. The defendants in their answer say, that no tithe had been paid for this coppice-wood, called *Holbrook Coppice*, when felled before; and that they never heard, that any tithe or *modus* had been paid for wood in that parish.

Parish cannot prescribe in *non decimando* for tithe-wood. *Qu.* Whether ever determined, that tithe-wood is due of common right? *a Wood's Decr. 145. S. C.*

It was insisted upon for the defendants, that tithe-wood was not due of *common right*; and that therefore the proof lay upon the plaintiff; and that it was only founded upon a canon in bishop *Stratford's* time, in the 17 E. 3. and therefore, the defendant need not allege any prescription or custom by way of exemption. But it was answered for the plaintiff, that occupiers must always set forth an exemption.

And by the court; the defendant ought to have shewn some exemption; and there is no instance, that a parish can prescribe in *non decimando* for tithe-wood; wealds and hundreds are upon another consideration.

But note, (says Mr. *Bunbury*), though the defendants were decreed to account, I do not find that it is yet certainly determined, that tithe-wood is due of *common right*.

Tr. 6 Geo. I. A. D. 1720. Scac.

Bliss v. Chandler. [Decree-Book, 15th July.]

BILL by the lessee of the rectory of *Maidstone*, for the tithe of hops in kind. The defendant said, that he paid the tithes of early hops by the bushel after they were picked, and the remainder by stripping the bines from every tenth pole or hill, and leaving them on the ground for the plaintiff to pick; and that this is as equal a mode of tithing, as setting them out, when picked, by the tenth bushel.

Hops tithe-able by every tenth bushel after they are picked. *Bunb. 20. S. C.*

The court declared, that hops are not tithable until they are picked, and that the tithes thereof ought to be paid in kind by the bushel, viz. every tenth bushel of the whole after picking; and they ordered the defendant to account accordingly.

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Tr. 6 Geo. I. A. D. 1720. Scac.

The Bishop of Exeter v. Trenchard and others. [Bunb. 47.]

Tender of
payment for
tithes, ad-
mitted after
answer.

IN a bill for tithes, the defendant, as to some of them, insisted upon a *modus*; but admitted others, which he had not paid; and having omitted to make a tender for those admitted by his answer, he upon motion obtained an order, that he might be at liberty to pay so much money in lieu and satisfaction of all his tithes, not covered by the *modus*, together with the plaintiff's costs to that time, and the plaintiff to proceed at the peril of costs. But Mr. Bunbury believes this was by consent; and see an *Anon.* case *supra*.

Tr. 6 Geo. I. A. D. 1720. Scac.

Loveday v. Moorer. [Decree-Book, 13th July.]

Decree a-
gainst a
farm *modus*
in the first
instance, on
account of
rankness.
See *vide*
supra &
infra.

BILL by the rector of *Hedfor* in *Bucks*, for tithes in kind of the defendant's farm. The defendant insisted on a *modus* of 24s. a year, payable in lieu of the tithes of the said farm.

The court declared, that the *modus* was too great a *modus* for the said premises, and thereupon ordered the defendant to account for the value of his tithes in kind.

M. 7 Geo. I. A. D. 1720. Scac.

Fisher v. Leaman. [Decree-Book, 16th Nov.]

BILL by the plaintiff, as rector of *Hemyock* in *Devonshire* (*inter al.*) for agistment tithe of lands called *Cley Park*.

The defendant *Leaman* said, that his father, for three years, had held and enjoyed *Cley Park*; but insisted, that he had fully paid and compounded with the plaintiff for the tithes of the same. He denied that he had ever rented, occupied, or enjoyed, as tenant, any messuage or lands in the parish, or in the tithable places thereof; or that he had ever bred up, fed, depastured, or agisted, on the said farm, any horses or other cattle, as in the bill is alleged; and said, that he was a butcher, and boarded with his father, but that he rented lands in *Clehydon* parish, and did sometimes bring home cattle from a fair late at night, and put them upon the said

farm called *Cley Park*, but that he drove them away the next morning home to his said parish, and that he had satisfied his father for the same before this suit was commenced; and therefore he is advised that no tithe is due from him to the plaintiff. He confessed that he had used the trade of a butcher ever since the expiration of his apprenticeship with his father, and had bought all sorts of cattle in the way of his trade, but had never depastured any of them in the parish of *Hemyock*, other than as aforesaid; and he denied that any tithes were due from him as in the bill is alleged.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading the proofs taken in the cause, and hearing counsel fully on the matter, it is ordered and adjudged by the court, that the bill be dismissed (*m*), with costs to be taxed by the deputy remembrancer.

M. 7 Geo. I. A. D. 1720. Scac.

Fox v. Ratty. [Bunb. 87.]

BILL by the vicar of *Melksham* against a parishioner for tithes.

An issue was directed to try whether a parcel of lands, called *Istlay*, usually paid tithes to the vicar of *Melksham*, or to the rector of *Whaddon* (who was not before the court); the jury find, that it had paid tithe to neither; and upon the *postea* returned, it was insisted for the defendant, that by this finding the court could make no decree, for that they had no satisfaction by it.

But, by the court, the vicar is endowed of all small tithes within the parish, &c. and the defendant's defence, both in law and equity, is falsified; and though tithes have never been paid, yet the vicar has the same right to all within his endowment, even without usage (unless a usage to the contrary is shewn) as the rector has of common right; in which last case a man cannot insist, that tithes have never been paid, which is a *non decimando*; and decreed for the vicar accordingly (*n*).

Court decree for vicar on return of *postea*, upon issue directed to try, whether tithes were usually paid to him, or to the rector, though the jury do not find that they were paid to either.

(*m*) The court agreed, that the demand ought to have been against the occupier of the land for the agistment tithes, if any had been due; but the barons thought that nothing was due; and Mr. baron *Page* observed, that as to what had been said, that the demand might be either against the occupier or the agistor, it could not be; for the same duty could not arise in two different persons at the same time. S. C. 2 Eq. Abr. 733. S. C. 8 Viner Abr. 38. pl. 7. Bunb. 3.

(*n*) The words of the decree were, that "it being found by the verdict, that the ground lies in *Melksham*, the court was of opinion, that the tithes of common right are due to the vicar of *Melksham*; and that the non-payment of them has not extinguished his right,

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P. 7 Geo. I. A. D. 1721.

Gumley v. Fontleroy. [Bunb. 60.]

Although a *modus* be pleaded, yet quantities and values must be set forth.

BILL by a vicar for tithes. The defendant pleads, that the plaintiff employed a person to collect the tithes, and that he the defendant paid the collector 5*l.* and does not set forth quantities and values; so the plea was over-ruled with costs; for this court never admits a plea, even of a *modus*, to cover the discovery of quantities and values, because the defendant may die before they go to examination; and then tithes lying only in the personal knowledge of the party, there would be no way of coming to the knowledge of the particulars; and the case of *Randal* against *Head* and others, *Easter* term, 13 *Car.* 2. was denied, and it was said, it had often been so.

P. 8 Geo. I. A. D. 1721. Scac.

Pye v. Rea. [Bunb. 72.]

In case defendant admits plaintiff's title to tithes, he need not shew any. 2 Wood's Decree. 170. S. C.

BILL by a vicar for tithes. The defendant admitted in his answer, that the plaintiff was entitled to all sorts of tithes, but insisted upon a special exemption; upon this admission the plaintiff was not obliged to shew any special title, either by endowment or prescription, which otherwise he ought to have done.

Tr. 7 Geo. I. A. D. 1721. Scac.

Turton v. Clayton. [Bunb. 80.]

Distributive *moduses* are not good. 2 Wood's Decree. 180. S. C.

BILL for tithes by the rector of *Standish*, in the county of *Lancaster*. The defendant insisted on a *modus* of three-pence for house, hay, hens, and yard, viz. for hay a penny, for an house a penny, for hens an halfpenny, and for yard an halfpenny.

By the opinion of the whole court; this is a void *modus*, taking it either distributively or entirely; for, as to the hay, a penny is unreasonable; for if a man has sixty acres of hay, he pays only a penny, and if he lets them to sixty several persons, they shall pay a penny a-piece. Defendant decreed to accompt.

Tr. 7 Geo. I. A. D. 1721. Scac.

Franklyn and others, Parishioners, v. The Master and Brethren of *St. Cross*, as Impropriators; *Bennet*, their Lessee; and *Jenkins* the Vicar of the Parish of *Fareham*, in the County of *Southampton*. [Bunb. 78.]

THIS bill was brought by the plaintiffs, the parishioners, against the defendants, to establish certain *modus*es in the parish; the first *modus* insisted upon (o), was twelve-pence for a milch cow; the second was sixpence for every calf killed and sold; the former (p) of them was adjudged to be a void *modus*, being too rank; the same being above half the value of the milk at the time the *modus* was supposed to commence.

Twelve-pence for a milch cow, and sixpence for every calf killed and sold, too rank. 2 Wood's Decr. 189 S. C.

The vicar being endowed of small tithes, and hay, it was decreed, that he was thereby entitled to hops (q) being a small tithe, though of growth since the endowment; and also to clover, *sainfoin*, and rye-grass, which are *species* of hay, that is the *genus*. No tithe due for after-pasture, or cattle fed on stubble.

Although by the endowment the vicar was to find the sacrament wine, yet the court were of opinion, it should be found by the parishioners, according to the direction of the canon.

Note. Where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not else.

M. 8 Geo. I. A. D. 1721. Scac.

Baker and others v. *Sweet*. [Bunb. 90.]

IN this case it seemed to be admitted, that wool of lambs shall pay tithes, though the lambs had paid tithes two months before; and that there ought to be paid tithe for the agistment of yearlings, being a new increase.

Tithe-wool of lambs, though they had paid before, shall be paid; and also, for the agistment of yearlings.

(o) The first *modus* was 12d. in lieu of the milk or white sale of every cow yielding milk.

(p) Both *modus*es were held void as too rank.

(q) As to hops a case was made; but how disposed of does not appear.

1721.

M. 8 Geo. I. A. D. 1721. Scac.

Heaton, Impropiator of Garnthorp, in Lincolnshire, v. Regal.
[3 Burn's E. L. 456.]

1st August,
and 1st
May, pro-
per time to
set forth
tithe lambs.

THE defendant insisted on a custom in that parish, to set forth tithe lambs on the first of *May*; but the court disallowed it, for that they were not fit to live without their dams, as appeared by the depositions in the cause; and it was referred to three neighbouring justices of the peace, to inquire what was a fit time for setting forth tithe lambs in that country; who certified the first of *August*, in their judgement, to be a proper time; and the court approved of it.

M. 8 Geo. I. A. D. 1721. Scac.

Crofts, Rector of Upper Clatford, in Hampshire.
[3 Burn's E. L. 456.]

Custom to
set forth
tithe-lambs
on St
Mark's
day, void.

THE defendant insisted on a custom in that parish to set forth tithe lambs at Saint *Mark's* day: the court declared it to be a void custom; and that the time for setting forth tithe lambs is, when they are fit to live without their dams, and thrive on the same food which their dam lives on, and when the owner weans his own.

H. 8 Geo. I. A. D. 1721. Scac.

Pecock v. Titmarsh. [Bunb. 102.]

BILL for tithes of houses, not within the city of *London*, and so not within the statute of 37 H. 8. c. 13.

It was admitted by the plaintiff, that the demand was against common right, and he did not allege this payment to be either by custom or prescription, but that this was the only provision for *St. Saviour's, Southwark*, in right of which church the plaintiff claimed.

It was proved, that the houses in the parish had, since the year 1653, generally paid twelve shillings a year; but no proof that defendant's house had paid for twenty-five years, but by one single witness; yet the court decreed an account without directing an issue.

P. 8 Geo. I. A. D. 1722. Scac.

Goddard v. Keble. [Bunb. 105.]

BILL by the rector of *Castle Eaton*, in the county of *Wills*, for tithe. The defendant insists upon several *modus*es. 1. Three-pence for every milch cow, in lieu of tithe milk. 2. Three-pence for every lamb yeaned in the parish; but this was given up as too rank, for ten three-pences amount to the present value of a lamb. 3. One shilling for a dry cow and ox depastured, &c. 4. One penny for each dry sheep, not shorn in the parish. 5. Three-pence for every colt fallen.

*Modus*es disallowed, no time being mentioned when payable. Milch cow. Three-pence for a lamb too rank, a *modus*. In *Reddington v. Nice*, Hil. 3 Geo. 2 Wood's Decr. 63. such a *modus* was allowed.

It not being alleged at what time these *modus*es were payable, the defendant was decreed to account. Note, the reporter believes this is the first instance in a court of equity that *modus*es were disallowed, upon this reason; but the editor of *Bunbury* refers to the cases of *Pemberton* and *Sparrow*, Tr. 9 Geo. I. and of *St. Eloy* and *Prior*, Hil. 10 Geo. I. and also further observes, that there was the same resolution in several cases since that time.

P. 8 Geo. I. A. D. 1722. Scac.

Baker v. Planner, and others. [Bunb. 108.]

BILL for tithes. Exception taken to the answer, that the defendant doth not set forth quantities and values; the defendant sets forth what tithable matters he had, and says, he had no other tithable matters whatsoever.

Quantities and values of tithes must be set forth particularly.

Barons *Price* and *Page* thought this insufficient; and that he should have set forth particularly "that he had not such and such things as charged in the bill (r);" and upon their opinion, the exception was allowed.

Baron *Montague* thought it would be well enough, if the defendant says he has no other tithable matters in the bill mentioned. But note, then it might be thought insufficient, if there was (as is usual) a general charge in the bill, that the defendant had divers other tithable matters.

(r) The reporter notes, that this seems very extraordinary, and contrary to the constant method of drawing answers. Id. ib.

1722.

Tr. 8 Geo. I. A. D. 1722. Scac.

The Bishop of *Lincoln* v. Sir *William Ellis* and others. [Bunb. 110.]

Decree in a cause, wherein the lessee only, and not the improprator, was a party, admitted to be read in evidence.

UPON a bill for tithes, as rector of *Barney*, in the county of *Lincoln*, the defendants insisted, that the lands were parcel of one of the greater monasteries, dissolved by the statute of 31 H. 8. c. 13.

A decree was offered to be read in evidence, wherein Sir *Thomas Skipwith*, lessee of the then bishop of *Lincoln*, was plaintiff, against the then tenants of the land; but it was objected to the reading of it; for that no admission of the lessee shall bind him that has the inheritance, and who was no party to the decree.

But by the opinion of the lord chief baron *Montague*, and baron *Price*, it was read; who said, they should have made no doubt of reading it, if the lessee had prevailed; and therefore they saw no reason, why it should not, since he did not prevail; but baron *Page* was of another opinion, and his reasons seemed to be the better.

Tr. 8 Geo. I. A. D. 1722. Scac.

Baily v. Worrall. [Bunb. 115.]

In a bill for a portion of tithes, in a neighbouring parish, the vicar of that parish must be a party.

BILL by plaintiffs, as lessees of the rector of *Winterbourne*, for a portion of great and small tithes in *Stoke Gifford*, being a neighbouring parish; and the tenants and the lay improprator, who claimed the great tithes in *Stoke Gifford*, were made parties; but, because the vicar of *Stoke Gifford*, who might be entitled to the small tithes, was not made a party, the bill was ordered to be dismissed; but, upon application, stood over with liberty to amend.

Tr. 8 Geo. I. A. D. 1722. Scac.

Penrice, vicar of *Dodderhill*, in *Worcestershire*, v. *Dugard*.

[3 Burn's E. L. 420.]

Modes for small tithes set aside, because no day of payment is de-

MODUS of 4 l. 10 s. for all small tithes, arising on an estate called *Impney*, set aside, because no day of payment was set forth by the defendant, in his answer.

H. 9 Geo. I. A. D. 1723. Dom. Proc.

Bennet v. Trepast (s). [2 Br. P. C. 437.]

THE plaintiff became vicar of the parish of *St. Giles without Crip-plegate* in April 1717, and in *Trinity* term 1719, he exhibited his bill in the court of exchequer against the defendants, as occupiers of houses within the said parish, for tithes, after the rate of 2 s. 9 d. in the pound, according to the yearly rent of their respective houses, and grounded his demand upon the statute and decree of 37 H. 8. c. 12.

The defendants, by their answer to this bill, admitted, that during the time therein mentioned they had respectively occupied houses within the said parish, viz. the defendant *Trepast* a house of the yearly value of 12 l.; the defendant *Becket*, a house of the yearly value of 16 l.; and the defendant *Witchell*, two houses of the yearly value of 22 l. But they insisted, that no such demand was ever made as 2 s. 9 d. in the pound, by any former vicar of the parish; nor was the same ever heard of within the parish, till the plaintiff became vicar, which was but two years before the commencement of the suit; and they further insisted that they were exempt from such payment, after the rate of 2 s. 9 d. in the pound, either by virtue of a proviso in the said statute and decree, whereby it was provided and decreed, "That where a less sum than after the rate of 6 $\frac{1}{2}$ d. in the 10 s. rent, or less than 2 s. 9 d. in the 20 s. rent, hath been accustomed to be paid for tithes, that then in such places the citizens and inhabitants shall pay only after such rate as hath been accustomed," or by some other lawful ways or means.

On a bill brought for tithes of houses in London, after the rate of 2 s. 9 d. in the 20 s. rent, according to the stat. 37 Hen. 8. c. 12. the court of exchequer directed an issue, to try whether any less sum or sums of money, than such customary payment, set up by the defendants, had ever been paid; and that too, though there was no proof of any regular *modus*.
Gilb. Eq. Rep. 191.
8 Vin. Abr. 568. pl. 3. n.
Bunb. 106. pl. 166.

(s) It is said, that this case being a matter of great consequence, the court of exchequer took time to consider of their decree. See *Bunb.* 107. And so they certainly did; for it appears, that this same cause came before the barons at no less than seven different periods, in various shapes, viz. in *Trinity* Term 1719, 2 *Brown* 437. pl. 69. *OB.* 27, 1738, 2 *Brown* 438. February 22, 8 *Vin. Abr.* 568. pl. 3. n. April 18, 2 *Brown* 439. April 26, *Bunb.* 106. pl. 166. and October 26, 2 *Brown* 437. pl. 69. Id. 439. *Bunb.* 107. and all in the year 1722; as also in January 31, 1723. *Bunb.* 143. pl. 223. and in Michaelmas Term, 12 Geo. I. 1726. *Gilb. Eq. Rep.* 191. besides the hearing on the appeal, March 7, 1722, in the Lords. 2 *Br. Ap. in Parl.* 439.

The

1723.

The cause, being at issue, and witnesses examined, was heard on the 27th of *October* 1720, and there being no proof that the 2 s. 9 d. was ever paid or demanded within the said parish, till by the plaintiff's bill, and some doubts arising concerning the same, the court directed that a case, as it appeared upon the evidence, should be stated and settled by counsel, on both sides; which was accordingly done to the effect following, *viz.*

That there was no proof in the cause, whether the houses in question were, or any of them was, in lease, at the time of making the said act, or not, or that the sum of 2 s. 9 d. in the pound was at any time paid according to the value of the houses, by virtue of the statute and decree of 37 *H. 8.* but it was proved by some of the plaintiff's witnesses, in their cross examinations on the part of the defendants, that, till the time of the present vicar, they never heard of any such demand as 2 s. 9 d. in the pound for tithes, within the said parish. That in two ancient tithe-books there appeared to be charged for tithes against the names of the then occupiers of *Trepas's* house, the several sums of 5 s. and 3 s. 4 d.; and in another ancient tithe-book, the several sums of 5 s. and 3 s. 4 d. and 2 s. 6 d.; which last mentioned sums of 3 s. 4 d. and 2 s. 6 d. were proved to be the collector's hand-writing, but the 5 s. charge against *Trepas's* house was of another hand-writing: and, in another book, the several sums of 3 s. 4 d. and 2 s. 4 d. were so charged, and proved to be of the collector's hand-writing; and that no certain sum annually, or *modus*, in relation to *Trepas's* house, was proved to have been paid, but as aforesaid. That in another tithe-book, commencing in the year 1708, and ending in the year 1713, *Bocket's* house was charged 1 s. 6 d. and *Witchell's* house 1 s. each, quarterly. It was proved by one *Surety*, that for nine years, during the time bishop *Fowler* was vicar of the parish, he, the said *Surety*, lived in *Trepas's* house; and, during that time, never paid more to the vicar than 10 s. a year, 2 s. 6 d. a quarter: therefore the question on the said case was, whether 2 s. 9 d. in the pound of the yearly rents of the said defendants respective houses was due for tithes, by virtue of the said statute, and decree of 37 *H. 8.* or not?

This case was twice argued by counsel on both sides; first, on 18 *April* 1722, and afterwards on 26th *October* following.

For the plaintiff it was argued, that the sum of 2 s. 9 d. in the pound, ought to be paid by the decree on the statute of 37 *H. 8. c. 12*; and they looked upon that statute to be the general law of

tithing in the city ; and that if the defendant could not set up a *modus* or composition, whereby it appeared that they paid less, that this rule of tithing ought to take place. And they made several objections to this *modus* set up by the defendants ; as, 1st, That it was not proved to be time out of mind, and nothing less than an immemorial custom ought to be a bar against a common right. 2d, It was not set out, that the *modus* was paid annually, or half yearly ; and if the particular time of the payment of a *modus* be not set out, the *modus* is not well pleaded, nor is it a good bar ; and the reason is, because the original agreement must be certain, that the person may know when and what to demand ; but here there was no time set forth in this *modus* ; and therefore it could be no good bar ; nor was the *modus* tendered to the plaintiff.

In this case they quoted for the plaintiff a decree, in the 16 Jac. 1. wherein the court had decreed 2 s. 9 d. in the pound ; and likewise the case of *St. Swithins, Sheffield and Serjeant*, in *Michaelmas* 1657 ; and likewise the case of *Umfreville and Plumstead*, Trin. 27 C. 2. *Grant and Cannon*, Mich. 5 Wil. and Mary. *Sir Patience Ward* and others *versus Kidder*, 5 Wil. and Mary. *Sayer versus Munford*, Mich. 6 Wil. and Mary ; and the case of *St. Bride's, Townly and Wilson*, (1) 7th July 1705 ; in all which cases the court had decreed

(1) This was a bill filed by the lessee of the dean and chapter of *Westminster*, (who was an attorney) to enforce, from the inhabitants of the parish of *St. Bride's*, in *London*, payment of tithes, according to the rates decreed by the statute 37 H. 8. c. 12. The defendants pleaded, that an ancient rate had been uninterruptedly paid in the said parish, until in the year 1666, when the said parish, excepting a few houses, was burnt down by the fire of *London*; that afterwards the statute 22 & 23 Car. 2. c. 15. directed, that the improPRIATORS of the destroyed parishes should pay to the respective incumbents the same monies as had been usually paid to them before the said fire ; that sixty pounds a-year had been usually paid to the vicar of *St. Bride's* ; that in the year 1675, there was a general assessment made on the said parish, both for tithes to the improPRIATORS, and the augmented tithes to the vicar, by which the vicar's maintenance was increased to one hundred and twenty pounds a-year ; and that the said assessment had been constantly adhered to and observed ; and the defendants, after setting forth the said rates made in 1675, and the annual rents of their respective houses, insisted, that they were only liable to pay the said rates in lieu of tithes. The several ancient books or rentals of the tithes of the said parish, from 1639 to 1676, were read in evidence. But the court decreed, that the defendants should pay after the rate of 2 s. 9 d. in the pound, on the yearly rents of the houses, shops, warehouses, and cellars, pursuant to the statute 37 H. 8. c. 12. From this decree the defendants appealed to the house of lords, stating however a somewhat weaker case than that which they had insisted upon in the answer. The cases delivered to the House, which I have taken from the *Lambeth* library, *Townly* MS. DOCL. 60, are as follows :

1723. creed the sum of 2 s. 9 d. *per* pound, according to the said statute and decree.

And

They stated that they were occupiers of several houses, &c. in *St. Bride's* parish, the rectory whereof is impropriate and belonging to the dean and chapter of *Westminster*. That by an act of parliament and decree therein mentioned, made in the 37 *H. 8.* it is enacted and decreed, that the citizens and inhabitants of the city of *London* and the liberties thereof, should pay of every 10 s. rent by the year, of all houses, shops, warehouses, cellars, and stables, 1 s. 4½ d. *per annum*, and of every 20 s. rent, 2 s. 9 d. and so above the rent of 20 s. by the year: which act may be reasonably presumed either to have been repealed, or not thought fit to be put in execution; for that no parish in *London* pays 2 s. 9 d. for every 20 s. of the improved rents for the tithes of their houses. That if the said act and decree were not repealed, but was still in force, yet there is a proviso in the said decree contained, that where a less sum than 2 s. 9 d. in the 20 s. rent had been accustomed to be paid for the tithes, that then, in such places, the citizens and inhabitants of *London* and the liberties of the same shall pay but after such rate as hath been accustomed. That 2 s. 9 d. according to the improved yearly value of the houses, shops, &c. in the said parish, was never paid in the parish for the tithes thereof, and above the sum of 3 d. *per* pound was never paid by the inhabitants or any of them to the dean and chapter of *Westminster*, their lessees or farmers, or any of them, for or in lieu of tithes of houses, shops, &c. in the said parish, nor was there ever till very lately any greater sum demanded by them for the same; which, in all probability, would have been done, had there been so great a sum as 2 s. 9 d. in the pound due and payable. That by an act of parliament made in the 22d & 23d years of the reign of the late *K. Charles 2. c. 15.* reciting, Whereas the tithes in the city of *London* were levied and paid with great inequality, and are, since the late dreadful fire there, in the rebuilding of the same, by taking away some houses, altering the foundation of many, and the new-erecting of others, so disordered, that, in case they should not, for the time to come, be reduced to a certainty, many controversies and suits at law might thence arise; it was enacted, that the annual certain tithe of all parishes in the said city and liberties thereof, the churches of which had been demolished, or in part consumed by the late fire, should be as followeth, (that is to say), the annual certain tithes, or money in lieu of tithes of the said parish of *St. Bride's*, 120 l. and the tithes of other the said parishes in the said city and liberties, the churches of which were demolished, or in part consumed, were reduced to a certain annual sum. That by the said fire all the houses in the said parish, except some few, were consumed; and the rebuilding of the said parish, great alterations and confusions were made, by reason that several streets were enlarged, for the publick good, by the laying of several houses into the said streets, and in the building of others in other places where none were before, and by reason of the rebuilding of some houses of some of the inhabitants upon part only of the ground where formerly others stood, whereof the appellant *Wilson's* house was one. That, as humbly conceived, the tithes of the said parish being reduced by the said act of 22 & 23 *Car. 2.* to a certain annual sum, all former tithes and payments ceased from that time, and the statute and decree in 37 *H. 8.* if they were in force before, yet, as to the parishes mentioned in the said act of king *Charles 2d.* are thereby repealed. That by reason of the said fire it might be reasonably presumed, that several parish books and other evidences were lost, whereby the certain annual sums payable in the said parish, in lieu of tithes, might have certainly appeared; and for the reasons aforesaid, it might equitably and reasonably be presumed, that at the making of the said statute of 37 *H. 8.* and long before, there were some constant payments in lieu of tithes within the said parish which

And Mr. baron *Price*, who was of opinion, for the plaintiff, said, 1723.
the statute was thought to be in derogation of the rights of the clergy;

which were less than 2 s. 9 d. in the pound of the improved rent, though the same, with the utmost strictness and exactness required by the rules of law, could not then be made out; and if so, then by the aforesaid proviso in the said decree made in the 37 H. 8. the inhabitants were only to pay according to the rates then accustomed. That before the said fire, the said dean and chapter, as impropiators as aforesaid, were at the sole charge of a preaching or officiating minister in the said parish of St. *Bride's*; yet, by the said act of 22 & 23 Car. 2. the inhabitants of the said parish are charged with the payment of 60 l. *per annum* to the said preaching or officiating minister, which was as much as the said impropiators are by the said act to pay, which it was very probable the makers of that law would not have done, had they conceived the inhabitants of the said parish were liable to the payment of 2 s. 9 d. in the pound, according to the improved yearly value of their houses, shops, &c. All which notwithstanding, the respondent, lessee of the said rectory under the said dean and chapter of *Westminster*, at the yearly rent of 113 l. 6 s. 8 d. did lately exhibit his bill in the court of exchequer against the appellants, to compel them to pay for and in lieu of the tithes of their houses, shops, &c. after the rate of 2 s. 9 d. for every pound of the full improved yearly rents or values thereof, and obtained a decree in the same court, under colour and pretence of the said act and decree made in the said 37th year of Hen. 8. That the public rates, taxes, and payments within the said parish amounted to above 7 s. *per annum* in the pound besides the said 2 s. 9 d. which sum of 2 s. 9 d. (the yearly value of the said parish, as it is rated to the land-tax being above 18,000 l. *per annum*), would amount to above 2475 l. *per annum*, which exceeds the yearly value of most bishopricks in *England*; and which sum of 2 s. 9 d. in the pound, if it should be exacted, would be the utter ruin of many poor people of the said parish, and tend to the depopulation thereof; and that there was great reason to believe, if this decree stands confirmed, the respondent would exact the said 2 s. 9 d. in the pound, for that he had served above 500 of the inhabitants with subpœnas to compel them to pay 2 s. 9 d. in the pound by the year, for their tithes, according to the improved yearly value of their houses, shops, &c. 200 whereof at the least were served with subpœnas since the appeal had been depending in the House, and amongst them were the appellants *Thomas Wilson* and *George Parker*.

The respondent on the other hand stated, That the dean and chapter of *Westminster* had theretofore made several leases of the tithes of the said parish to several persons, in trust for the parish; that the parish being so entitled to the tithes, made such rates and assessments from time to time upon one another as they thought fit. And when, by the act for rebuilding *London*, the vicar of St. *Bride's* maintenance was settled at 120 l. *per ann.* (whereof the dean and chapter pay yearly of their money 60 l. *per ann.* by way of augmentation) the parish, who ought to have paid the other 60 l. *per ann.* made a rate upon the tithes for the same, and charged the tithes with the yearly payment thereof; that the inhabitants being called upon from time to time to renew their lease, neglected and at last refused so to do, unless they could have a lease on their own terms, in regard they had held the tithes so long, that they thought no person could find out or discover the same; that the old lease being expired, and the parish refusing to renew, the dean and chapter made a lease for 21 years to the respondent *Towneley*, on 24th April 1703, in consideration of 600 l. and 113 l. 6 s. 8 d. rent *per ann.*, whereof 60 l. *per ann.* is for the augmentation of the vicar of St. *Bride's* towards his maintenance: that the respondent, after he had obtained his lease, said a whole year soliciting the parishioners

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clergy; for it appears by *Lindwood* 201, and by *Stow*, that the laity used to pay one halfpenny in the pound, to the clergy, upon

to pay their tithes, but could not get one penny; nor would they deliver to him the ancient tithe books and papers belonging to the impropriation; that the respondent exhibited his bill in the exchequer in *Easter* term 1704, against four persons (who were the appellants) upon the statute and decree made in the 37th year of king *Henry* the 8th for 2 s. 9 d. in the pound, being the only law for payment of tithes in *London*; but, instead of paying any monies, a long cross-bill was presently exhibited against the respondent, upon many frivolous and groundless suggestions, on purpose to put the respondent to all the trouble and charge they could. That on 10th *May* 1705, the respondent's cause came on to be heard, and the court ordered the cause to stand for the then next term, to see if the defendants would agree the matter in the mean time; but no agreement being made, the cause was further continued till the 17th *July* then last, when a decree was made for the respondent for his tithes after the rate of 2 s. 9 d. in the pound, according to the appellant's answer. That notwithstanding this decree, the respondent could not get one penny of money, nor had he received one sixpence throughout the parish; that the parish had yearly taxed the respondent for his tithes at 200 l. *per ann.*, which he had paid (although, while the parish had the tithes, they never taxed the same), and he had also constantly paid the reserved rent of 113 l. 6 s. 8 d., but had not received any money from the parishioners; that several of the parishioners proposing to agree with the respondent, such persons were threatened to be loaded with taxes and offices, if they made any agreement, and so would not proceed therein; that the inhabitants had laid and collected a tax through the parish to raise money to go to law with the respondent, and declared that unless he would take what they pleased to give him, he should never have any tithe in the parish; that the appellants had appealed from the decree in the exchequer, under pretence there was no such decree or act of parliament for payment of tithes in *London*, or that a less sum in the pound was payable for the same; whereas the said decree and act of parliament of the 37 *H. 8.* are in the printed Statute-book always allowed, and many decrees successively from time to time grounded upon the same; there being no other rule or law for the impropriator's tithes in *London*, where there are not ancient *modus*'s; nor had the appellants any pretence of *modus*'s, all their books by them produced being from time to time according to the rate of 2 s. 9 d. *per* pound rent, and there also are different rates or sums, whereas a *modus* must always be the same sum without variation.

The appeal was brought into the house on the 13th of *November* 1705: On the 30th the respondent moved that a short day might be appointed for the hearing of the appeal, and that the appellants might be ordered to produce three paper-books they had produced in the court of exchequer. The 11th of *December* was accordingly appointed for the hearing, which was afterwards, by an order of the 7th of *December*, postponed till the 8th of *January*, in the hopes of an accommodation: however, on that day the counsel for both parties were heard, and the lord keeper was ordered to make his report to the house of what the counsel had offered on the 22d of that month, which time was afterwards enlarged to the first of *February*. But the judgement of the house upon the case was never had, for after the argument by counsel the parties agreed to submit themselves to the arbitration of the archbishop of *Canterbury*, lord *Sommers*, and lord *Hallifax*; and their award, it should seem, was afterwards ratified by parliament, for an act passed this session fixing the impropriate tithes of this parish at 400 l. *per ann.* clear of all deductions, and directing the respondent to be paid at that rate for his arrears. *Vide* *St. 4 Ann. c. 27.*

every

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every *Sunday* and holiday, which came to a greater sum than 2s. 9 d. viz. 3s. 5 d. in the pound.

But it was resolved by the three judges, that the case upon this statute, was not like a *modus*; for the decree in the statute is, that all houses within the city of *London* and liberties, shall pay 2s. 9d. for every 20s. rent; and then comes the provision in sect. 18. "Provided also, and it is decreed, that where a less sum than 2s. 9d. in the 20s. rent, has been accustomed to be paid for tithes, that then, in such places, the said citizens and inhabitants shall pay but only after such rate, as has been accustomed."

Now they said it was plain by the statute itself, and by the citation before mentioned in *Lindwood*, that in many places in the city there had been a custom to pay tithes, according to the pound rate; and these the statute never intended to alter or enlarge, but to establish; for the statute was not designed in destruction of any settled right: nay they took it farther, that if there had been a payment of less sums by agreement between the parson and parishioners, they were confirmed by the statute; because it was the design of the statute to settle such customary payments; and it was the design of it, that they should not be unravelled on either side; and accordingly such customary payments and agreements have been complied with ever since the statute; and that less sums have been paid by almost every parishioner to the parson; and therewith they have been content; and although several decrees have been made in this court for payment of 2s. 9d. in the pound; yet no customary payments in any parish have been set aside or broken through; but these matters have been compounded between the parties; and the manner of tithing has continued the same in each parish, except in such parishes as are otherwise regulated by the statute 22 *Car. 2. c. 15.*

They said, that sect. 18. was a perfect exception of all those, that had paid less sums, out of the decree; and therefore this could not be urged as a *modus*, or set up in bar of tithes; for tithes were originally due; and therefore the bar must be complete; but there are no tithes of houses due of common right; for they are none of those things that *renovant in annum*; and therefore the common law (which follows the *Levitical* pattern) did not make them tithable; and therefore, they are tithable only by custom or agreement, where there have been such customs and agreements.

The new rate of 2s. 9d. in the pound was super-induced by the decree; and it is a strange thing to say that the decree was in prejudice

1723. creed the sum of 2 s. 9 d. *per* pound, according to the said statute and decree.

And

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• Now if all that pay less sums be exempted from payment under the decree, and are not within the decree, nor within the obligation of the statute, we ought to try whether there be such accustomed payments or not, especially since, in this case, it appears by the books of the parson, that less sums were collected; and it could not have been presumed, that they would have been collected in that manner, if they had not been old accustomed payments; for how could those sums have come into the parson's books, if they had not been the old accustomed dues?

And the difference of the payments in the books may be reconciled by supposing some of them to be quarterly, some half-yearly payments.

This case relates to the inheritance, and the inheritance is to be bound by our decree; and where the inheritance is charged merely by custom, it is usual and just, if the parties desire it, to try such custom at law.

The court conceiving some doubt in relation to these payments, ordered that it should be referred to a trial at law, upon this issue, *viz.* Whether any, and what sum or sums, less than 2 s. 9 d. in the 20 s. rent had been accustomedly paid by the defendants for tithes, for the houses in possession of the defendants, or any, and which of them; although no proof, that there had been any regular *modus*.

In this case were quoted, 2 *Inst.* 660. *Noy* 130. *Hardr.* 116. *Watson* 387 to 399. *Cro. Car.* 596. *Yelv.* 31. *Moor* 912. 11 *Co.* 15. *Grant's case.* *Littl. Rep.* 102. 141. *Degge* 351. *Hob.* 11.

From this decretal order the plaintiff appealed to the House of Lords, insisting that no issue whatever ought to have been directed; because there could be no occasion to send those facts to be tried by a jury, which had already been settled and agreed to by the consent of both parties; and that with so much care and deliberation, as to take up fifteen months in preparing the same, to the appellant's great delay and prejudice: that it appeared from the answer of the respondents, that there was no one customary rate in that part of the parish of *Cripplegate*, which lies within the city of *London*; the respondent *Trepas's* pretended payment being after the rate of about 12 d. in the pound, and *Bocker's* and *Witchell's* after the rate of about 4 d. in the pound, and no more; and for this reason also, it was apprehended an issue was unnecessary: that the respondents had not given the least plausible proof of any *modus* or customary payment whatsoever, so as to bring them within the proviso of the act of

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parliament;

Bunb. 143. Upon motion that the plaintiff should produce at the trial the books of the former rector, it was objected that these were properly private books, and the plaintiff's own evidence; but as they had been before produced at the hearing of the cause, and as the issue to be tried was to inform the conscience of the court, the jury ought to have all the light the court can give them; and therefore the plaintiff was ordered to produce these books at the trial.

1723. creed the sum of 2 s. 9 d. *per* pound, according to the said statute and decree.

And

They stated that they were occupiers of several houses, &c. in *St. Bride's* parish, the rectory whereof is impropriate and belonging to the dean and chapter of *Westminster*. That by an act of parliament and decree therein mentioned, made in the 37 *H. 8.* it is enacted and decreed, that the citizens and inhabitants of the city of *London* and the liberties thereof, should pay of every 10 s. rent by the year, of all houses, shops, warehouses, cellars, and stables, 1 s. 4½ d. *per annum*, and of every 20 s. rent, 2 s. 9 d. and so above the rent of 20 s. by the year: which act may be reasonably presumed either to have been repealed, or not thought fit to be put in execution; for that no parish in *London* pays 2 s. 9 d. for every 20 s. of the improved rents for the tithes of their houses. That if the said act and decree were not repealed, but was still in force, yet there is a proviso in the said decree contained, that where a less sum than 2 s. 9 d. in the 20 s. rent had been accustomed to be paid for the tithes, that then, in such places, the citizens and inhabitants of *London* and the liberties of the same shall pay but after such rate as hath been accustomed. That 2 s. 9 d. according to the improved yearly value of the houses, shops, &c. in the said parish, was never paid in the parish for the tithes thereof, and above the sum of 3 d. *per* pound was never paid by the inhabitants or any of them to the dean and chapter of *Westminster*, their lessees or farmers, or any of them, for or in lieu of tithes of houses, shops, &c. in the said parish, nor was there ever till very lately any greater sum demanded by them for the same; which, in all probability, would have been done, had there been so great a sum as 2 s. 9 d. in the pound due and payable. That by an act of parliament made in the 22d & 23d years of the reign of the late *K. Charles 2. c. 15.* reciting, Whereas the tithes in the city of *London* were levied and paid with great inequality, and are, since the late dreadful fire there, in the rebuilding of the same, by taking away some houses, altering the foundation of many, and the new-erecting of others, so disordered, that, in case they should not, for the time to come, be reduced to a certainty, many controversies and suits at law might thence arise; it was enacted, that the annual certain title of all parishes in the said city and liberties thereof, the churches of which had been demolished, or in part consumed by the late fire, should be as followeth, (that is to say), the annual certain tithes, or money in lieu of tithes of the said parish of *St. Bride's*, 120 l. and the tithes of other the said parishes in the said city and liberties, the churches of which were demolished, or in part consumed, were reduced to a certain annual sum. That by the said fire all the houses in the said parish, except some few, were consumed; and the rebuilding of the said parish, great alterations and confusions were made, by reason that several streets were enlarged, for the publick good, by the laying of several houses into the said streets, and in the building of others in other places where none were before, and by reason of the rebuilding of some houses of some of the inhabitants upon part only of the ground where formerly others stood, whereof the appellant *Wilson's* house was one. That, as humbly conceived, the tithes of the said parish being reduced by the said act 22 & 23 *Car. 2.* to a certain annual sum, all former tithes and payments ceased from that time, and the statute and decree in 37 *H. 8.* if they were in force before, yet, as to the parishes mentioned in the said act of king *Charles 2d.* are thereby repealed. That for reason of the said fire it might be reasonably presumed, that several parish books and other evidences were lost, whereby the certain annual sums payable in the said parish, in lieu of tithes, might have certainly appeared; and for the reasons aforesaid, it might equitably and reasonably be presumed, that at the making of the said statute of 37 *H. 8.* and long before, there were some constant payments in lieu of tithes within the said parish

which

clause in the aforesaid statute or decree, "That if any variance, controversy, or strife, do or should arise within the said city, for the non-payment of tithes, &c. or if any other doubt arise, upon any other thing contained within the said decree; that upon complaint made by the party grieved to the mayor of the city of *London* for the time being, the said mayor, by the advice of counsel, shall call the said parties before him, and make a final end in the same, with costs to be awarded, by the discretion of the said mayor and his assistants;" which method if the appellant had thought fit to have taken, the matters in question might have been long since determined at a very easy expence; and therefore it was hoped, that the order would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decretal order therein complained of was (*diffentiente clero*) justly affirmed, as lord chief baron *Gilbert* says.

Order affirmed.
Lords Jour.
vol. 22.
p. 109.
Gilb. Eq.
Rep. 194.
Bunb. 107.

The following note is subjoined to the appellant's case :

"The appellant humbly hopes he is sufficiently authorized in affirming, that this right was vested in the clergy of *London* by the immemorial custom of that city, antecedent to the statute. It appearing in the case of *Dr. Dunn*, related in *Sir H. Calthorp's Reports*, fol. 62. from the records of *London*, there referred to, and from several books of great antiquity, that in 13 *H. 3.* there was an ancient custom, which had then been used time out of mind, that provision should be made for the ministry of *London*, in this manner, *viz.* That he which paid 20s. for his house, should offer every *Sunday*, and every apostle's day, whereof the evening was fasted, an halfpenny; and he that paid but 10s. rent yearly should offer but one farthing; which amounted to 2s. 6d. in the pound in the whole year; there being then, besides the fifty-two *Sundays*, eight apostle's days, the vigils whereof were fasted, and no more: which payment continued till 13 *R. 2.* about which time, the clergy, beginning to insist on offerings to be paid on twenty-two saints days more, it then amounted to 3s. 3d. in the pound yearly. And, in 36 *H. 6.* there was a composition between the citizens of *London* and the ministers, that this payment should be made according to that rate. But disputes afterwards arising, there was a submission to the lord chancellor, and divers others of the privy-council, and they made an order for payment of tithes, according to the rate of 2s. 9d. in the pound, which was first promulged by proclamation, and afterwards established by act of parliament, 27 *H. 8. c. 21.* There was another order or decree made to the same purpose,

1723. creed the sum of 2 s. 9 d. *per* pound, according to the said statute and decree.

And

They stated that they were occupiers of several houses, &c. in *St. Bride's* parish, the rectory whereof is impropriate and belonging to the dean and chapter of *Westminster*. That by an act of parliament and decree therein mentioned, made in the 37 *H. 8.* it is enacted and decreed, that the citizens and inhabitants of the city of *London* and the liberties thereof, should pay of every 10 s. rent by the year, of all houses, shops, warehouses, cellars, and stables, 1 s. 4½ d. *per annum*, and of every 20 s. rent, 2 s. 9 d. and so above the rent of 20 s. by the year: which act may be reasonably presumed either to have been repealed, or not thought fit to be put in execution; for that no parish in *London* pays 2 s. 9 d. for every 20 s. of the improved rents for the tithes of their houses. That if the said act and decree were not repealed, but was still in force, yet there is a proviso in the said decree contained, that where a less sum than 2 s. 9 d. in the 20 s. rent had been accustomed to be paid for the tithes, that then, in such places, the citizens and inhabitants of *London* and the liberties of the same shall pay but after such rate as hath been accustomed. That 2 s. 9 d. according to the improved yearly value of the houses, shops, &c. in the said parish, was never paid in the parish for the tithes thereof, and above the sum of 3 d. *per* pound was never paid by the inhabitants or any of them to the dean and chapter of *Westminster*, their lessees or farmers, or any of them, for or in lieu of tithes of houses, shops, &c. in the said parish, nor was there ever till very lately any greater sum demanded by them for the same; which, in all probability, would have been done, had there been so great a sum as 2 s. 9 d. in the pound due and payable. That by an act of parliament made in the 22d & 23d years of the reign of the late *K. Charles 2. c. 15.* reciting, Whereas the tithes in the city of *London* were levied and paid with great inequality, and are, since the late dreadful fire there, in the rebuilding of the same, by taking away some houses, altering the foundation of many, and the new-erecting of others, so disordered, that, in case they should not, for the time to come, be reduced to a certainty, many controversies and suits at law might thence arise; it was enacted, that the annual certain tithes of all parishes in the said city and liberties thereof, the churches of which had been demolished, or in part consumed by the late fire, should be as followeth, (that is to say), the annual certain tithes, or money in lieu of tithes of the said parish of *St. Bride's*, 120 l. and the tithes of other the said parishes in the said city and liberties, the churches of which were demolished, or in part consumed, were reduced to a certain annual sum. That by the said fire all the houses in the said parish, except some few, were consumed; and the rebuilding of the said parish, great alterations and confusions were made, by reason that several streets were enlarged, for the publick good, by the laying of several houses into the said streets, and in the building of others in other places where none were before and by reason of the rebuilding of some houses of some of the inhabitants upon part only of the ground where formerly others stood, whereof the appellant *Wilson's* house was one. That, as humbly conceived, the tithes of the said parish being reduced by the said act 22 & 23 *Car. 2.* to a certain annual sum, all former tithes and payments ceased from that time, and the statute and decree in 37 *H. 8.* if they were in force before, yet, as to the parishes mentioned in the said act of king *Charles 2d.* are thereby repealed. That for reason of the said fire it might be reasonably presumed, that several parish books and other evidences were lost, whereby the certain annual sums payable in the said parish, in lieu of tithes, might have certainly appeared; and for the reasons aforesaid, it might equitably and reasonably be presumed, that at the making of the said statute of 37 *H. 8.* as long before, there were some constant payments in lieu of tithes within the said parish

whic

H. 9 Geo. I. A.D. 1723. Scac.

Bate v. Hodges. [Bunb. 125.]

BILL by the rector of *Wareham* in the county of *Kent* for tithes. The defendant insists upon these *modus*es, viz. 1 s. an acre for marsh, meadow, and pasture land, 4 d. an acre for up-land, meadow, and pasture, payable at *Michaelmas*, for hay and all small tithes within the parish (except hops).

Modus for marsh-land, up-land, hay, and all small tithes.

Note. It was admitted, if the *modus*es had been for tithe-hay only, or the tithe arising on the land, the 1 s. had been too rank.

What modus too rank for hay.

Baron *Price* was of opinion, these were (as laid) void *modus*es; *Page* and *Gilbert*, barons, that they were good, and decreed accordingly for the defendants (*u*).

H. 9 Geo. I. A.D. 1723. Scac.

Lloyd v. Mackworth. [Bunb. 126. Decree-Book. Hil. 9 Geo. fo. 285 b.]

BILL for tithe-wood. The defendant insists, that it was timber; but does not say that it was above twenty years growth.

Timber shall be presumed to be of above twenty years growth, unless the contrary be proved.

By the court.—We will presume timber to be above twenty years growth, unless the plaintiff proves the contrary.

P. 9 Geo. I. A.D. 1723. Scac.

Evans v. Nevill. [Bunb. 128.]

BILL for the tithe-wood of all extra-parochial lands within the forest of *Dean*, by virtue of a grant from king *Edward I.* of all tithes issuing from assarts within the forest, of new assarts, and to be assarted; but by the proofs it appeared, that some of the lands were never grubbed up, but were always wood lands, and no tithes were paid.

Assart means lands grubbed up and made fit for tillage. 2 Wood's Decr. 212.

(*) It should seem from the Decree-book (2 Wood's Decr. 211.) that *Price*, as well as the other two barons, at first held the *modus*es to be good: however, upon a rehearing, they adjudged them to be void: but they were brought again before the court, in the case of *Bate v. Howland*, 6th July 1720, (2 Wood's Decr. 257.) and were finally decided in the case of *Sidney v. Hale*, 27th January 1731. (2 Wood's Decr. 325.)

1723.

By the court.—Assart is only such lands as have been grubbed up and made fit for tillage; and the bill was dismissed as to the lands that were never grubbed up.

P. 9 Geo. I. A. D. 1723. Scac.

Burwell v. Coates. [Bunb. 129.]

Whether any difference between lay and spiritual person, claiming tithes, as to his setting forth a title.

BILL by the plaintiff as lessee of the impropriate rectory of *Nor-manby*, in the county of *Lincoln*, under the dean and chapter of *Lincoln*, for tithe-hay.

It was insisted upon for the defendant, that the plaintiff (being a lay impropriator) had not set forth a sufficient title; and upon that the long controverted question, whether there was any difference between a lay and spiritual person (claiming tithes) was revived. But it was not now determined; for, by the court, the tithe was well enough set forth in the present case.

Modus of four shillings at Easter, payable in lieu of tithe hay, of a farm, disallowed as fraudulent and uncertain.

The defendant insisted upon a *modus* of 4 s. payable at *Easter*, in lieu of tithe-hay, arising on his farm, and other lands particularly set forth.

By the court.—This is a void *modus*, because it may introduce a fraud; for if a farmer should turn all his arable land into meadow, he would be discharged of the whole 4 s.; besides, it is too uncertain, it not being certain what a farm consists of.

M. 10 Geo. I. A. D. 1723. Scac.

Lloyd v. Mackworth. [Bunb. 138. Decree-Book. H. 9 Geo. fo. 285 b. M. 10 Geo. fo. 68.]

Decree against the one defendant, the other making default in a bill against two for tithes, with the whole costs.

BILL for tithes against two. The defendants answer separately; and there were separate examinations; one defendant made default; and there was now a decree against the other, with the whole costs; and the court would not distinguish, as to the costs, between the two defendants, but left *Mackworth* to get his contribution from the other, as he could. But note, this, as it seems, can only be by bill (x).

(x) This case is marvellously misstated. Neither of the defendants made default; they both appeared at the hearing by their counsel; and the decree was, that they should each pay the sum reported to be due from him, together with the plaintiff's costs, to be taxed by the deputy remembrancer. But, admitting the facts to have been as stated in the text, the court could scarcely have acted, even in that case, as they are stated to have acted.

M. 10 Geo. I. A. D. 1723. Scac.

1723.

Lambert v. Cummin [Bunb. 138.]

BILL for tithes in the parish of *Warton* in the county of *Lancaster*. The defendant insists upon an exemption for his estate, called *Hilderstone*, and for his right of common on *Yelland Common*, as appurtenant to the said estate, which estate was parcel of the possessions of the abbey of *Cokersand*, one of the greater abbies. The exemption was proved; but it was objected for the plaintiff, that the common is only a *profit appendre* out of other land; and an exemption cannot arise for an appendancy, or an appurtenancy.

A common appurtenant to an estate is entitled to the same exemption as the estate.

But *by the court*; we will make no distinction between the common and the estate; and decreed for the defendant (y).

M. 10 Geo. I. A. D. 1723. Scac.

Boys v. Ellis. [Bunb. 139.]

IN a bill for tithes, a question arose, whether there was fraud in titthing lambs, on this case: the ewes were kept by the defendant in the parish of *Driffeld*, in the county of *York*, (where the demand lay), all the year until *Christmas*, when they were ready to drop their lambs, and then were removed into the parish of *Skern*, (where there was a small *modus* only for lambs), and there kept till *Lady-day* for convenience of forage, as insisted upon by the defendant, and at *Lady-day* were brought back to *Driffeld*. Note, there was no demand of tithe *pro rata*; and *quare*, if there had, if it could be decreed; for the tithe of lambs must be paid where they fall, and is not a divisible thing as wool is. Note, the land in *Skern* was the defendant's own.

What removal of ewes ready to drop their lambs is fraudulent.

Tithe of lambs not divisible as wool.

By the court. Here is not a sufficient proof of fraud, and the plaintiff's bill was dismissed.

But *Page* and *Gilbert*, barons, thought at first, it might be proper to send it to an issue, to try, whether fraud or not fraud; and whether this had been the usual method of the defendant's course of husbandry; but, afterwards, they concurred with baron *Price*.

(y) The court declared, as it appears by the Decree-book, that the defendant's estate called *Hilderstone*, and the lands thereunto belonging, insisted on by the defendant in his answer, to be discharged from the payment of any tithes, were exempt from the payment of any manner of tithes; and that the right of common upon *Yelland Common* was appurtenant to the said estate called *Hilderstone*, and was therefore likewise exempted from the payment of tithes.

1723.

M. 10 Geo. I. A. D. 1723. Scaç.

The Bishop of London and Beaumont v. Nicholls. [Bunb. 141.]

Bill for
sithes by the
bishop and
sequestrator,
during the
incapacity
of the in-
cumbent,
dismissed
for want of
making the
incumbent
or his com-
mittee a
party.

BILL by the bishop of *London*, and *Beaumont*, as sequestrator during the incapacity of mind of *Barefoot*, the present incumbent, for tithe-wood in the parish of *Birchanger* in the county of *Essex*. The defendant demurs, for that it does not appear, that either of the plaintiffs had any title. It was insisted upon, by the counsel for the defendant, that (now, since the division of parishes) the whole right to tithe was vested in the rector, and the bishop had nothing to do with the right, (even since the statute of 28 H. 8. c. 1. which relates to a vacancy), but only to take care that the cure be supplied, and the profits sequestred for that purpose; and the other plaintiff was only a sequestrator, who, as it appears by the form of the sequestration, and by his own shewing in the bill, was only an agent and collector. Besides, the incumbent *Barefoot* should have been made a party; for, possibly, at this time, he may have recovered his right senses; and if he should exhibit his bill, a recovery now could not be pleaded in bar of his demand. Baron *Price* was of opinion, that no decree could have been for the plaintiff, if it had been a sequestration during a vacancy, nor can there be in this case; but *Pagg* and *Gilbert*, barons, were of opinion, the bill had been well enough, if *Barefoot* had been a party, either in person, or by his committee; and the bill was dismissed, but without costs, the want of parties not being expressly assigned, as cause of demurrer. And *note*, the words ("and for divers other causes, &c.") (z) were not in the demurrer as they should have been.

H. 10 Geo. I. A. D. 1724. Scac.

Goole, Clerk, v. *Jordan* and others. [Bunb. 144. (a)]

One in-
stance with-
in 30 years,
of a com-
position with
the vicar for
agistment

tithe of the close wherein it was claimed, held sufficient title in him to the small tithes, on a bill by him for tithe herbage and furze.

(z) If a party demurring *ore tenus*, or, which is the same thing, for any cause not specially assigned, be not entitled to costs, as it is certain he is not; it is difficult to conceive how this case could be bettered in that respect by the insertion of these general words.

(a) The statement of the case is corrected from the Decree-Book. 2 *Wood's Dec.* 218.

and alleged that they believed the close was part of the possessions of the dissolved abbey of *Eynsham*, and exempted by stat. 31 H. 8. c. 13.

1724.

The plaintiff made out by his proof, that the vicar was entitled to all small tithes within the parish; that the great tithes were constantly paid to the impropriator; and gave one instance within thirty years of a composition with the vicar for the agistment tithe of this close.

The defendants proof was negative, that they never knew tithe paid for this close; and although it was objected, that a vicar should have made out a fuller title to the small tithes, yet the court were of opinion it was sufficient; and decreed the defendant to account.

H. 10 Geo. I. A. D. 1724. Scac.

Beardmore v. Gilbert. [Bunb. 159.]

THIS was a bill brought by the impropriator, for the tithe of *Forley and Oakmore*, in the parish of *Alford* in the county of *Stafford*. The defendant in his answer insists, that the ground, for which the tithe is demanded, is heath and barren ground, and exempted by stat. 2 & 3 E. 6. c. 13. for seven years, but he admits by his answer, that it was wood-ground, which had been grubbed up; and therefore the plaintiff's counsel insisted it had yielded profit before, and was not barren ground, within the meaning of the statute of 2 & 3 E. 6.

Wood-ground grubbed up, is not exempted for seven years as barren land, within the statute of 2 & 3 E. 6. c. 13.

This came on upon bill and answer, and it appearing from the defendant's own admission, that it was wood-ground grubbed up, the defendant was decreed to account.

H. 10 Geo. I. A. D. 1724. Scac.

Birch v. Stone. [Decree-Book, fo. 113.]

TO a bill for tithes, the defendants said, that there is a meadow in the said parish, called the *Parson's Meadow*, and that the plaintiff and his predecessors had, time out of mind, enjoyed the said meadow, and also several beast-grasses in the said parish, in lieu of the tithes within the said parish.

A *modus* of a meadow and beast-grasses in lieu of tithes, void for uncertainty.

The court, upon mature deliberation had thereon, declared, that the *moduses* laid in the answer, by reason of their uncertainty, are not good; and thereupon ordered the defendants to account for their several tithable matters and things.

1724.

H. 10 Geo. I. A. D. 1724. Dom. Proc.

Crayborne v. Taylor. [2 Br. 517.]

By the several statutes of dissolution, tithes in the hands of laymen are declared to be temporal inheritances, and lay fees; and they have also the like remedy in the temporal courts, and may sue for them in like manner, as for lands, tenements, and other hereditaments; and tithes have at this day all other incidents belonging to temporal inheritances.

THE plaintiff exhibited his bill in the court of exchequer, against the defendant, stating, that *William Redman* of *York*, esq. being seised in fee, or of some other estate of inheritance, or possessed for some long term of years, or otherwise entitled in his own right, or in trust for his children, *William Redman*, *Watkinson Redman*, and *Alice* the wife of *Richard Atkinson*, in and to all those the tenths and tithes of corn, grain, hay, and other tithes, as well great as small, of what nature and kind soever, with all and singular the rights, members, and appurtenances, yearly arising and growing within the villages, fields, and hamlets, of *Eastnesse*, *Crook-Holme*, and *South-Holme*, within the parish of *Hovingham*, in the county of *York*, by indenture, dated 27th *January* 1721, made between the said *William Redman* of the one part, and the plaintiff of the other part; the said *Redman* demised to the plaintiff, all and singular the said tithes of corn, grain, and hay, with all and singular their rights, members, and appurtenances, yearly; and from time to time coming, growing, increasing, and renewing within the villages, fields, and hamlets of *Eastnesse*, *Crook-Holme*, and *South-Holme*, or in any of them within the parish of *Hovingham* aforesaid, and lately belonging to the dissolved monastery of *Newbrough*, in the said county; and all other the tithes, as well great as small, with their and every of their rights, members, and appurtenances, of whatsoever nature, kind, or condition the same were; and all his, the said *William Redman*'s right, title, interest, claim, and demand whatsoever, as trustee for his said children, of, in, or to the said tithes and premises, or any part thereof, to hold the same to the plaintiff, his executors, administrators, and assigns, from the 25th of *March* preceding the date of the said indenture, for twenty-one years, under the yearly rent of 20 l.: that by this lease, the plaintiff became fully and legally entitled to receive, or otherwise to have a satisfaction made to him for all the said tithes, growing or arising within all, or any the places aforesaid: that the defendant, who was owner and occupier of several lands, pasture and meadow, within *Eastnesse* aforesaid, refused to pay the plaintiff, or to make him any satisfaction, for the small tithes and herbage, arising from the

the appellant's lands in *Eastneffe* aforesaid, or which grew or renewed in the year 1721, out of or upon the said lands and grounds; wherefore the bill prayed, that the defendant might set forth the particular quantities and values of the said tithes; and that the plaintiff might have a satisfaction for the same, and be otherwise relieved in the premises.

To this bill the defendant demurred; and for the causes of demurrer alleged, that the plaintiff had not by his bill set forth, as he ought to have done, how *William Redman*, who thereby appeared to be a layman, became entitled to the tithes demanded by the said bill, whether by grant, prescription, or otherwise; or what estate the said *William Redman* had in the said tithes, or whether he had power to demise the same; or that any estate in the said tithes did or could pass from the said *William Redman* to the plaintiff; for which reasons, and other defects in the said bill, the defendant prayed the judgement of the court, whether he should be compelled to make any further or other answer thereto, and prayed to be dismissed with costs.

On the 28th of *May* 1723, this demurrer was argued, when the court were divided in opinion; the lord chief baron *Montague*, and Mr. baron *Gilbert*, being for over-ruling it; and Mr. baron *Price* and Mr. baron *Page*, for allowing it; whereupon, according to the course and practice of the court in such cases, the demurrer was ordered to be over-ruled, but without costs; and that the defendant put in his answer to the said bill.

From this order the defendant *Taylor* appealed, and on the behalf of the appellant it was insisted, that *William Redman*, under whose lease the respondent claimed, not being a rector, or one who was entitled to tithes of common right, the respondent ought to shew a title in *Redman*; that the appellant might have an opportunity of inquiring into, and satisfying himself concerning the title, and, if he found it good, that he might submit to pay tithes, without further trouble or expence: that the pretence of title in *William Redman* might be under a term of years which the respondent did not set forth, nor for what time that term was to continue, and for any thing which appeared by the bill, the term might be expired; that the bill stated *Redman* to be entitled in his own right, or in trust for his children; and that he demised to the respondent all his right, title, interest, claim, and demand, as trustee for his said children; whereas it did not appear, what the trust was, or what his estate was, which he had as trustee; neither did it ap-

1724. pear, that *Redman*, or any under whom he claimed, ever received the tithes of the lands in question.

On the other side it was argued, that tithes in the hands of laymen, are now of a different nature, and come under another consideration from what they were at common law; for, by the several statutes of dissolution, they were made and declared, in the hands of laymen, as temporal inheritances and lay fees; and more particularly, it is enacted by the statute of 32 H. 8. c. 7. that lay persons shall have the like remedy for the recoveries of tithes in temporal courts, and are enabled to sue for them, in the like manner, as they may for lands, tenements, and other hereditaments; and tithes have at this day all other incidents belonging to temporal inheritances: that the obliging the respondent to set forth his lessor's title further than he had in general done, was binding him to a great difficulty, he being no ways privy to or confusant of his lessor's right, any otherwise than as appears from his covenant in the lease: that the respondent's not setting forth the title, as required by the demurrer, was only matter of form, and could have no influence on the merits of the cause, or prejudice the appellant in his right to the tithes, if he had such right, or to any discharge or exemption from the payment of them: that this judgement was agreeable to former resolutions in cases of the like nature; and even in those where greater exactness and certainty was required, than in a bill of this kind; and therefore, it was hoped, that the appeal would be dismissed with costs.

Order affirmed.
Lords
Journ.
22 vol. 281.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the order therein complained of, affirmed; and it was further ordered, that the appellant should pay to the respondent 30*l.* for his costs in respect of the said appeal.

P. 10 Geo. I. A. D. 1724. Scac.

Finch v. Masters and others. [Bunb. 161.]

Modus of
1 d. for hay,
and of 26 s.
8 d. for hay,
small tithes,
and Easter
offerings,
allowed.

BILL by the rector of *Winwick*, in the county of *Lancaster*, for tithe-grass, cut and made into hay; one defendant insists, that he, and all those, &c. in an ancient messuage called *Newballs*, and the demesne lands thereunto belonging, containing sixty-eight acres, two roods, and eighteen perches, in *Astton*, within the said parish, have immemorially paid a *modus* of a penny at *Easter* annually, in lieu of the tithe-hay growing on the premises.

Another

Another defendant insisted upon a *modus* of 26 s. 8 d. for hay, small tithes, and *Easter* offerings, for an ancient tenement, called *Brynn* and *Garfwood*; containing six hundred and twenty-five acres.

It was objected for the plaintiff, that it appearing by the proof in the cause, that this payment was for hay, (as a small tithe), therefore hay made from grass being in its nature a great tithe, it must be intended that this hay penny was for something else; and the ancient import of the word hay or haw, was a hedge, or some small inclosure belonging to a house. It was also objected to this and the other *modus*, that they were uncertain, and could not be supposed to have a reasonable commencement; and, thirdly, were liable to fraud; for if all the land was turned into meadow, it would pay but one penny. But, notwithstanding these objections, both these *moduses* were allowed by the court.

Tr. 10 Geo. I. A.D. 1724. Scac.

Woodnoth v. Lord Cobham. [Bunb. 180.]

A LAY impropriator preferred his bill for the great tithes of the parish of *Thornborough*, in the county of *Buckingham*. The defendant insisted, that there was a payment of 16 s. 4 d. to the vicar, in lieu of the tithes of the *chauntry pastures*, (which were in demand); and to prove this, produced accounts of one *Edward Chaplin*, who was steward to the defendant's father, wherein there were entries of this payment. But, it was objected for the plaintiff, that though a parson's or a vicar's book (where it appeared that payments were made) were good evidence, yet never admitted in the case of him who has the fee.

Entries in old books of the defendant, by steward, of payments made to the vicar in discharge of a *modus*, admitted in evidence against the lay impropriator, in a suit by him. 2 Wood's Decr. 226

But by the court (baron *Price* dissenting); even old rent-rolls (where it appears payments have been made) are good evidence. And they ordered these entries to be read: But note, by baron *Gilbert*, they ought to be read, because no better evidence can be had: but, if *Edward Chaplin* had been alive, they ought not.

The payment of this *modus* to the vicar being fully proved, the court dismissed the bill, with costs.

1724.

Tr. 10 Geo. I. A. D. 1724. Scac.

Philips v. Symes and others; et e contra. [Bunb. 171.]

*Modus for
furze and
underwood
decreed.*

BILL by the rector of *Stoke Abbots* in the county of *Dorset* (amongst other things) for the tithe of furze, coppice, and underwood, milk, calves, wool, and fruit, &c. of gardens.

The defendants insist,

1. That no tithe of furze ought to be, or ever was paid, unless it was sold.

2. Nor any tithe of coppice, or underwood, if cattle were depastured, where the wood grew.

*Garden
penny al-
lowed.*

3. They insist upon a garden penny, for the produce of the garden.

*8 d. for a
cow, and
4 d. for an
heifer, ad-
judged
good.*

4. Upon a *modus* of 8 d. for every cow, and 4 d. for every heifer, in lieu of the tithe of milk and calves of such cow and heifer.

5. That 3 s. 4 d. was payable for every score of sheep, shorn out of the parish, and so proportionably for a less number than twenty, or for a less time than a year, for the wool and lamb of such sheep.

Note. The defendants omitted in their answer to specify the day whereupon the respective *moduses* were payable; and therefore, to supply that defect, they exhibited their cross-bill to establish these *moduses*, and alleged the same to be payable at *Easter*.

Upon hearing both these causes together, it was decreed by the court,

1. That the defendants ought to account for furze, coppice, and underwood; for the defence, as to these, amounts, in effect, only to a *non decimando*.

2. That although the plaintiff in the original cause had a right to a decree for tithe in kind, because the defendants had omitted the day on which the *moduses* were payable, yet now that defect was supplied by their cross-bill, both causes being now as but one; and it would introduce great inconsistency in the decree, if the *moduses* should, for that reason, be adjudged void in the original cause, and established in the cross cause, provided they are good in other respects.

3. The

3. The garden penny was allowed.

4. The 8d. for a cow, and 4d. for a heifer, were adjudged good; though it was objected, that it was not good for the milk and calf, for then it would be payable, although there was no calf; to which it was answered, that then the 4d. and 8d. would be payable, for it was payable for all the tithe a cow, &c. produces, which is only milk and calf.

5. To the 3 s. 4d. for every score of sheep shorn out of the parish, and so proportionably for a less number than twenty, or for a less time than a year, for the wool and lamb of such sheep, it was objected; 1. That this is too rank. 2. It is payable for wool and lamb, though the lambs might be fallen before the sheep were removed, and the tithe of lamb would be payable before. 3. There is great uncertainty, because of the fractions which might arise, when a small number were only removed. 4. It is liable to fraud; for the parishioner might remove them out of the parish a little way only, just before shearing time, and then bring them back again.

To the above objections it was answered by the court; 1. We (b) cannot take notice of this, nor enter into the consideration thereof. 2. It is payable at *Easter*, and is a satisfaction for all the wool and lamb, and lamb before that time. 3. The same objection might be made to arise from the fraction, where there was only a small quantity of wool, and tithe in kind paid. 4. If fraud appeared, as it would be taken to be, under the circumstances put in the objection, then the parishioners should pay tithe in kind, as well as if they had continued in the parish, to which the *modus* does not extend.

So the defendants were decreed to account in the original cause for tithe of the furze and wood; but the bill was dismissed as to the rest, and the other *moduses* were established on the cross cause.

But, upon a rehearing, it appeared that the *modus* was alleged in the cross-bill to be payable at *Easter*, or otherwise when the sheep shall be sold, which being uncertain, it was adjudged to be void by the whole court, and the defendants were decreed to account for the tithe of wool and lamb.

Decree-book,
Feb. 3, 1725.

(b) But the reporter asks why not? *Bunb.* 173.

1724.

Tr. 10 Geo. I. A. D. 1724. Scac.

Gumley v. Burt. [Bunb. 170.]

Bill for
beans and
peas, no
endowment
being pro-
duced, or
usage prov-
ed, dismissed
as to them.

BILL by the plaintiff, as lessee of the vicar of *Thistleworth*, for tithes of peas and beans, set and sowed in rows, drilled, hoed, and hand-weeded in a garden-like manner, against the lessee of the impropriator, (the dean and chapter of *Windfor*), as being a small tithe. The defendant insists, that a great part of the parish is converted into this method of cultivation, and that this tithe was never paid to the vicar, but always to the impropriator.

The cases of *Stephens* against *Martin*, and of *Nicholas* against *Elliot*, were quoted by the counsel for the plaintiff. The counsel for the defendant answered, that it did not appear in the first case, that the impropriator contested the matter, nor what the endowment was; and that as to the second, there was a proof of usage by the vicar for forty or fifty years receiving tithe peas and beans, where plough and spade were used; but, where the plough only was used, the impropriator received them.

By the court.—There being no endowment produced, nor usage proved in the present case, the bill must be dismissed, as to the demand of peas and beans.

M. 11 Geo. I. A. D. 1724. In Canc.

Webber v. Taylor. [Sel. Caf. in Ch.]

Modus to
pay a sum
of money;
but if in ano-
ther person's
hands, mo-
ney or tithe
in kind, ill.

Modus not to
be establish-
ed against
the rector,
without tri-
al, if de-
sired.

BILL was brought to establish a *modus*, which was laid thus, for payment of such a sum of money; but, if in the hands of any person, to pay tithe in kind, or the money, at the election of the parson.

Lord Chancellour. I will never establish a *modus* against the parson without a trial at law, if he desires it; but this *modus* is clearly ill: for a *modus* cannot be defutory.

M. 11 Geo. I. A. D. 1724. Scac.

1724.

Chapman v. Barlow. [Bunb. 183.]

BILL by the rector of *Radnage*, in the county of *Buckingham*, for the tithe of head-lands, of a mill and cherries. Head-lands not tithable.

The defendant insists the head-lands were only large enough to turn the plough upon, and as to this, the bill was dismissed.

As to the mill, no tithes thereof having ever been paid, and being an ancient mill, it was adjourned, to consider whether the tithe of a water corn-mill was a predial or personal tithe (c).

As to the black cherries, the defendant insisted they grew wild in hedges, and waste places, and served for fencing his grounds; but the defendant was decreed to pay the tithe of these cherries.

H. 11 Geo. I. A. D. 1724. Scac.

Jones v. Barret. [Bunb.]

BILL by the vicar of *West Dean*, in the county of *Suffex*, against the defendant, who was sequestrator, for an account of the profits received during the vacancy. It was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives by statute of 18 H. 8. c. 1. It seems the bishop should be a party to a bill against the sequestrator, during the vacancy of a church.

The court seemed to think the bishop should have been a party; but by consent this cause was referred to the bishop of the diocese.

H. 11 Geo. I. A. D. 1724. Scac.

Bibye v. Huxley. [Bunb. 192.]

IN a bill for tithes of wood by the rector of *Whipmead*, in the county of *Bedford*, the question was, whether birch was esteemed timber in this county, which went to an issue to try (d). Issue to try whether beech esteemed timber in the county of Bedford.

(c) If the mill in question was an ancient mill, and had never paid tithe, it was not tithable. The adjournment, therefore, to consider whether the tithe of a mill not tithable was predial or personal, was, it must be acknowledged, a gratuitous act in the court.

(d) It appears from the exchequer chamber-book, that the words, "*referred to a trial at law whether,*" are struck out; so that it seems, no issue was ultimately directed. The decree was, "that the defendant do come to an account with the plaintiff for the values of the tithes of wood for the time in the bill, (except for oak, ash, and maiden trees of beech, above twenty years growth), and beech wood proceeding from stools originally maiden trees, above twenty years growth; that as to the tithes of ash trees or any other matter, if any difficulty shall appear, the same shall be reported specially, and that the deputy remembrancer do take the account, and that the costs be reserved. 2 Wood's Decr. 238.

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H. 11 Geo. I. A. D. 1724. Scac.

Boughton v. Wright. [Bunb. 186.]

A custom of tithing corn by throwing nine sheaves into the owner's cart, and leaving the tenth for the parson, without previously setting out the tenth, is bad.

BILL by the rector of *Barrow*, in the county of *Suffolk*, for the tithe of corn, &c. The defendant insisted, that he set out the tenth sheaf of wheat and rye, and the tenth shock of barley, according to the custom of the parish. The custom he would have proved, was, that the defendant's cart was brought into the field, and he threw nine sheaves into the cart, and left the tenth for the plaintiff.

The question was, whether this customary method of tithing the corn was good; for it was insisted upon, on behalf of the plaintiff, that nine sheaves ought to be set out on the ground, and the tenth left out, and marked with a green bough for the plaintiff; and that they ought not to bring the cart in the field, and throw the nine sheaves into the cart, before the whole ten are set out; for the plaintiff ought to be able to view and judge, whether he has a fair and just part.

And the court would not let the defendant in to prove the particular custom, upon this general allegation; so he was decreed to account; for they thought the whole ten ought first to be set out, before the nine are thrown into the cart.

H. 11 Geo. I. A. D. 1724. Scac.

Downes v. Moreman, et e contra. [Bunb. 189.]

Written evidence giving "all and all manner of tithes" will support a claim to a portion of tithes.

BILL by the rector of *Bonchurch*, in the *Isle of Wight*, in the county of *Southampton*, for the great and small tithes of a farm, called *Luccomb Farm*, in the defendant's possession.

The defendant insists that *Lovcomb* alias *Luccomb Farm*, formerly belonged to the abbey of *Quarr*; that the abbot of *Quarr* was seised in fee of the manor and farm of, &c. and all the tithes renewing thereon, as of a portion of tithes in gross; that this abbey, by surrender, and by stat. 27 H. 8 c. 28. came to the crown; that after king *Henry's* demise, the same descended to king *Edward* the sixth, who, in the seventh year of his reign, by his letters patent granted "the manor of *Lovcomb* and *Grange*, &c. and all and all

1724.

manner of tithes, &c. in the said manor of *Levecomb*, &c. parcel of the revenues of the said late abbey of *Quarr*," to *Cotton* and others; and so derives the title down to *Knight*, to whom the defendant was lessee for twenty-one years; and in his answer he set forth the clause in stat. 27 H. 8. c. 28. §. 2. "That all persons, &c. who should have by any letters patents, any lands, &c. tithes, &c. belonging to any monastery, &c. dissolved by that statute, should hold the same, in like form, manner, and condition, as the abbots, &c. held the same, and might have held the same, if the said abbies had not been suppressed."

This part
the answer
does not
appear in
the Decree-
book.
2 Wood's
Decr. 238.

This cause was heard *February 11*, A. D. 1724, and the defendant carried his proof down, from the year 1289, in a regular method to the hands of the defendant's lessors the *Knights*. But note, all the written evidence produced mentioned the tithe only by "all and all manner of tithes," &c. but in none of the instruments was mention made of a portion of tithes; upon which the plaintiff founded his objection, that no title appeared in the defendant; a portion of tithes being a thing distinct from tithes in the general acceptance. Note, there were never any tithes in kind paid.

But the proof being so clear, the plaintiff's bill was dismissed by the whole court, and the party had a decree on his cross-bill to enjoy his tithes pursuant to his grants, &c.

A copy of an agreement between the abbot of *Quarr* and the monks of *Lyra* was produced in evidence; to which it was objected for the plaintiff, that by the rules of evidence, it could not be read, being neither a record nor a publick thing. But the defendant producing a copy of the statutes of *Oxford*, that no book, &c. should go out of the *Bodleian* library; the court gave him leave to read this copy of agreement in evidence, though they admitted it not to be within the general rules of evidence, upon the very particular circumstances of this case.

Copy of a
greement
between the
abbot of
Quarr and
monks of
Lyra, ad-
mitted to be
read upon
the parti-
cular cir-
cumstances
of the case,
though con-
trary to the
general rules
of evidence.

1724.

H. 11 Geo. I. A. D. 1724. Scac.

Mills v. Etheridge. [Bunb. 210.]

Plea of non-residence, to a bill for tithes, by lessee of a rectory, allowed, without any discovery of quantity or value.

BILL by the lessee of *Matthew Hawes*, clerk, (setting forth his lease, dated *February 4, 1723*;) for the tithes, &c. for 1724, and 1725, in the parish of *Simpson*, in the county of *Buckingham*.

The defendant, as to the discovery of the quantity of lands he held, and what tithes he had in those years, and also as to the account, pleads, that it appears by the plaintiff's bill, that his lease was dated *February 4, 1723*; he then pleads the statute of 13 *Eliz. c. 20.* touching leases of benefices, and other ecclesiastical livings with cure; and avers, that *Matthew Hawes*, clerk, the lessor, was absent from his benefice eighty days and more, in one year since the lease, and before the filing of the bill, viz. in 1724; that the church of *Simpson* is not impropriate, and that it is a benefice or ecclesiastical promotion with cure, and therefore by such non-residence, and by virtue of the said act, the lease was absolutely void.

Now, upon arguing this plea (which was drawn by Mr. *Bunbury*), baron *Price* was for over-ruling it, because it covered the discovery, which, according to the usage of the court, a plaintiff was entitled to, whatever exemption or discharge a defendant might have (and at the time of drawing the plea Mr. *Bunbury* was of that opinion, and so informed his client); but the lord chief baron denied it to be law, and with *Page* and *Hale* was of opinion, that the plea was good, extending even to discovery, because it amounted to an absolute incapacity in the plaintiff, which differed from the cases, where the plaintiff was entitled of common right; and there is no necessity to aver that the absence was voluntary, (for if it was otherwise, it lay upon the plaintiff to shew it), or to aver, that the absence was eighty days together; so the plea was allowed.

P. 11 Geo. I. A. D. 1724.

Johnson v. Firebrace.

Agistment tithe how to be valued. In *Hawkins v. Joyce*, Hil. 1721. fo. and P. 1723, fo. 1 b. 2-

THE deputy remembrancer reported, that the number or kinds of cattle agisted could not be ascertained; but, it appearing to him that the lands were rented at 110*l. per annum*, he had allowed to the plaintiff 1*s. 6d.* in the pound of the said rent. The court confirmed the report, which was special, and ordered payment.

Agistment tithe was decreed at the rate of 2*s.* in the pound in the yearly rent of the land.

Tr. 11 Geo. I. A. D. 1724. Scac.

Sir Edward Blacket v. Dr. Finney. [Bunb. 176.]

BILL suggested, that there was a *modus* of 4 d. a score of all sheep going on *Gayerfield*, in the parish of *Ryton*, in the county of *Durham*, in lieu of tithe of lamb and wool; that the defendant libelled in the spiritual court for tithes in kind; that the plaintiff moved for a prohibition in the court of pleas in *Durham*, but permitted a consultation to go, and depended on relief in this court, and prayed to have the *modus* established.

The defendant, doctor *Finney*, insisted, that there was no such *modus*, but that the 4 d. was in lieu of the milk of the ewes, which was usual in that country.

Now, upon motion for an injunction to the spiritual court, the defendant's counsel insisted, that this was proper matter of suggestion on a prohibition; and also the defendant had in the answer denied the *modus*.

But by the court, there being some dispute between the parties, whether the *modus* is as alleged in the bill, and as the spiritual court cannot try the *modus*, we will grant the injunction (e).

Injunction to the spiritual court to stay a libel for tithes in kind, where a *modus* of 4 d. a score of all sheep in lieu of tithe of lamb and wool, is prayed to be established. 8 Mod. 375. S. C.

Tr. 11 Geo. I. A. D. 1724. Scac.

Egerton v. Still [Bunb. 198.]

IT was decreed by the court in this cause, 1st, That the plaintiff should have *Easter* offerings as due of common right, although he demanded them as due by custom. 2. That where there are above [or under] ten of calves, lambs, pigs, &c. the tithe of the odd number above [or under] ten shall be paid according to the value; and not be carried over to the next year.

their values. 2 Wood's Decr. 251. S. C.

Easter offerings due of common right. Odd numbers above or under ten calves, lambs, &c. to be tithed according to their values. 251. S. C.

(e) An issue was afterwards directed on the *modus*, upon the trial of which the plaintiff was nonsuited, and the bill was dismissed, with costs, both at law and in equity. 2 Wood's Decr. 250.

1724.

Tr. 11 Geo. I. A. D. 1724. Scac.

Lawrence v. Jones. [Bunb. 173.]

Easter offerings are due of common right, and are a compensation for personal tithes.

Not impropiator but parson only seems entitled to such offerings.

BILL by the vicar of *Brackworth*, in the county of *Gloucester*, for tithes. It was decreed by the whole court, that *Easter* offerings were due of common right, at 2 d. a head, unless it had been customary to pay more: that the vicar ought to have a decree accordingly, though there was no proof of *Easter* offerings ever having been paid, (there being a lay impropiator, who is not entitled to offerings, but he only who exercises a spiritual function). But *quære*; and it was said by baron *Gilbert*, that offerings were a compensation for personal tithes.

M. 12 Geo. I. A. D. 1724. B. R.

Serjeant v. Trelawney. [MSS.]

Where there is a suit for tithes in the spiritual court, and a *modus* is pleaded, a prohibition shall go, unless it be shewn that the plea has been allowed as well as received.

TRELAWNEY, rector of *C.* in *Cornwall*, libelled against *Serjeant* in the ecclesiastical court for tithes. *Serjeant* pleaded several *moduses*; and thereupon moved for a prohibition, which Mr. *Cruise* for the defendant opposed, saying, the spiritual court have received the plea.

Sed per cur. The meaning of that is, the spiritual court will receive the plea, and thereupon give judgement against the defendant there, that these are no good *moduses*. There is a great difference between receiving a plea and allowing it. If the spiritual court allow this plea, and the plaintiff there confesses it, they ought thereupon to give judgement against him, because he has not in his libel demanded the *moduses*, but tithes in kind. But, if the *moduses* be denied, there must be a prohibition to the spiritual court in *defectu triationis*, because that court cannot try it. But *Cruise* said, the plea was confessed and allowed in the spiritual court, and they were only going to give judgement for the payment of the *moduses*; and desired some further time to prove this, which was granted till the first day of the next term. And then a prohibition was granted upon the plaintiff's motion, no one appearing for the defendant in prohibition.

H. 12 Geo. I. A. D. 1725. Scac.

Hanson v. Fielding. [Gilb. Eq. Rep. 225.]

A BILL was brought by a lay impropriator claiming under a grant from the crown, after the dissolution of the religious houses, for tithes within the parish and boundaries of *Shilton* and *Barnacle*, in the county of *Warwick*, the tithes of corn, grain, wool, and lamb, for the year 1723. Defendant, as to the tithe for wool and lamb, says, that he is lessee of the vicar of *Anstis*, and that the small tithes did not belong to the mother church, but were received by the chaplain of *Anstis* long before the dissolution of religious houses, and that after they came into the hands of the crown, they were also enjoyed distinctly. As to the tithes of corn and grain within the manor of *Barnacle*, he says, that the lands were formerly part of the possessions of the hospitallers of *St. John of Jerusalem*, and that his lands were discharged from the payment of tithes, while they continued in his own manurance and occupation; that his lands by virtue of some acts of parliament (27 H. 8. c. 21. 31 H. 8. c. 13. 32 H. 8. c. 24.) were vested in the crown, and were to be held and enjoyed by the king and his grantees, in as large and ample manner as the late religious houses held them; that he was a grantee under the crown, and consequently entitled to hold them discharged from tithes.

Of exemption from tithes as being parcel of the possessions of the priors of *St. John of Jerusalem*. *Bunb.* 214. pl. 291.

Mr. *Bunbury*, for the defendant, objected, that the lands of the hospitallers of *St. John of Jerusalem* coming to the crown by the statute 32 H. 8. c. 24. they could not claim the privilege of the clause of exemption, in the statute 31 H. 8. c. 13. by which it is appointed, that all monasteries, abbies, &c. which before had come, or hereafter should come to the king by suppression, surrender, &c. should be held and enjoyed by him, in as large and ample manner as the religious houses held them; and whereas many of them were discharged from tithes, they should be held by the king and his grantees discharged, &c. and cited 2 Co. 47 a. archbishop of *Canterbury's* case, where it was resolved, that the clause of discharge should extend only to those possessions, which came to the king by the said act; and that it would be absurd, that the branch of the act 31 H. 8. should extend to a future act of parliament, which the makers of the said statute 31 H. 8. without the spirit of prophecy, could not have foreknowledge of, and insisted strongly upon the

1725.

case of *Cornwallis and Spurling*, Cro. Jac. 57. *Moor* 913. *Degg*. 346. and *supra* 224. as an express authority in point.

Serjeant *Pengelly*, for the defendant, made use of two ways to take off the objection; first, that part of the land of the hospitallers of St. *John of Jerusalem* were vested in the crown by the 31 *H. 8.* and that the 32 *H. 8.* was only made, because of the great compass of their estates (some of which were in *Ireland*) and to be so general, as to comprehend all that might be omitted in 31 *H. 8.* and then without doubt the branch of the act concerning discharge from tithes extends to them. But, if the court should think these lands passed only by the 32 *H. 8.* he thought, secondly, that even upon that statute the grantee should hold them discharged from tithes; and seeing it had been resolved by some judges, that the clause of exemption in the 31 *H. 8.* should not extend to latter statutes, (though at first that was a doubt upon the words "or hereafter shall come"), he would therefore wave that, and rely upon the 31 *H. 8.* by which they were vested in the crown with all privileges, &c. Now one of their privileges was, that they should hold the lands discharged from tithes, whilst they continued in their occupation, which being continued to the crown by the said statute 31 *H. 8.* we say is a real discharge annexed to the land, and going along with it, and it has been accordingly expressly granted to us; for we have a grant dated the 15th *December*, 4 *Ed. 6.* of this manor of *Barnacle*, &c. with the very same words, as are in the statute, viz. "with all privileges, &c." and we have enjoyed it ever since with benefit of this exemption. And he cited *T. Raym.* 225. *Fosset and Franklin*, where it is said by *Hale* chief justice, that by reason of the word "privileges," they shall not pay tithes, and resolved accordingly by the court.

Serjeant *Cumins* senior, and Mr. *Ward* senior, on the same side, cited *Dy.* 227 b. pl. 60. *W. Jon.* 182. *Bridg.* 32. *Lat.* 89. and per *Ward* in *Tr.* term 1087, the case of *Daniel*, vicar of *Bengo*, in *Hertfordshire*, and Sir *John Gower*, where, upon considering all the cases, this court held all the lands discharged, and dismissed the bill.

Mr. *Bunbury* said in reply, that, in the case in *Dyer*, the lands came to the crown by 31 *H. 8.* and then they were immediately exempt, as, *Bridg.* 32. *Lat.* 89. *W. Jon.* 182. As the case appears, the court was equally divided upon the point of discharge. As to *T. Raym.* 225. it was a very short report, and it does not appear upon what reasons the court went. The great stress is laid

1725.

upon the word "privileges" in the statute 31 H. 8. and if that of itself had been sufficient, for what reason did they insert a particular clause of exemption from tithes? He insisted upon the case of *Cornwallis* and *Spurling*, which being determined upon a special verdict, the book also taking notice, that the like judgement was given upon a demurrer, is of great authority.

Gilbert chief baron. Those privileges were granted to this ecclesiastical corporation by bulls from the pope; but these discharges, for want of a special clause to continue them, were extinguished, in as many of them as were dissolved by the 27 H. 8. but that cramping the king in his alienation, in 31 H. 8. they put in a clause to continue to the crown the privileges that were in them as special corporations. Now the question is, whether the word "privileges" in 31 H. 8. has the smallest intent to carry all other privileges to the crown. If the point had not been resolved, we should not have disputed it.

Nota. It was no further settled, for when the plaintiff went into his proof of the grants of the tithes of these lands, they appeared to be grants of different possessions, therefore his bill was dismissed, in that he failed in making out his title.

² Wood's
Decr. 257.

P. 12 Geo. I. A. D. 1726. Scac.

Coleman v. Barker. [Gilb. Eq. Rep. 231.]

THE plaintiff by his bill demanded tithes for the depasturing of sheep on turnips, remaining on the ground unsevered.

Tithes for
depasturing
sheep on
turnips, &c.

The defendant said the sheep paid tithes of wool, and that tithes ought not to be paid twice.

It appeared, that after shearing-time the defendant fed his sheep with turnips, whereby they were bettered 5s. a sheep; that they went about five months on the turnips, and then were sold to the butcher; and the defendant brought in a like quantity of new sheep before shearing-time came again, so that the plaintiff always had tithe of wool of the full number.

Pengelly for the plaintiff said, that this improvement of the sheep by the turnips, was a new increase, and that consequently tithes ought to be paid for the improvement and increase; and if the turnips had been severed, there had been no doubt but tithes had been due. He cited three cases which he relied on.

First,

1726. First, The case of *Nicholas and Hooper*, 1 *Roll. Abr. Dism.* 462. pl. 7. where it is adjudged, that if a man pays tithe-lamb at *Marke-tide*, and afterwards at *Michaelmas* shears the residue of the lambs, viz. the other nine, he shall pay tithe-wool, although he had before paid tithe of the lambs; for, says the book, it is a new increase.

Secondly, The second case which he quoted was *Eastmond* against *Sandys* [*supra* 558.] a demand for tithe-herbage of oxen, which were depastured to be fattened.

The defendant insisted, that these oxen had been used for the plough, and so were exempted; that their labour improved the parson's tithes, and so to pay tithe for their agistment would be double tithing: but the court of exchequer decreed, and it was affirmed in the house of lords, that tithe-herbage was due for the time they were taken from the plough, they being then no otherwise beneficial to the parson in tithes.

Wood's
Decr. 273.

Thirdly, The case most relied on was a decree in this court, *Hill. 1 W. & M. Dummer and Wingfield*, which was a demand of tithe for pasturage of sheep, from the time of shearing till they were sold. The defendant insisted that by the sheeps' depasturing on the land it was improved, and the plaintiff's tithes bettered thereby: but the court decreed an account, and said, that this was no bar to the plaintiff's demand: and this decree, upon rehearing, was affirmed.

Ward and Bunbury for the defendant argued, that if this demand prevailed, it would be double tithing, which was contrary to the whole tenor of the law, and cited many cases for that purpose. But the court agreed, that it was a new increase; that they could not distinguish it from the case of *Dummer and Wingfield*; that the distinctions laid down in the case of *Eastmond* and *Sandys* were good, and decreed, that the defendant should go to an account.

P. 12 Geo. I. A. D. 1726. Scac.

Cuthbert v. Westwood and others. [Gilb. Eq. Rep. 230.]

What pay-
ments in
lieu of
tithes, are
good, &c.

BILL against land-owners to establish a right of 40l. *per ann.* and in lieu of tithes; which by a decree in time of *Car. 1.* was to be paid out of particular lands (which were formerly part of the forest of *Braden*) to the vicar of *Churchlade* in *Wiltshire*.

Two objections were taken for want of parties. First, that these land-owners were tenants to the crown, of lands lying within

within the bounds of the forest (which formerly paid no tithes), and that so the attorney general ought to have been made a party. 1726.

Answer. It does not appear by the bill that they are lessees under the crown, and the defendants have not insisted upon it in their answers, and so that is out of the case.

Second objection. It is not sufficient to make the land-owners only, but they should have made the occupiers, parties to the bill; for a decree against the land-owners could not affect them.

Answered by *Bunbury*, That it would be endless to make all the occupiers parties, and if that was necessary to be done, the plaintiff could never come at his right; for there were great numbers of them, and any single one dying, would put the plaintiff to his bill of revivor, and cited the case of *Brisco* against the undertakers of the land-bank, before lord-keeper *Wright*, who said he would not oblige them to bring all before the court, since the right might be determined by having a view; which the court thought reasonable.

The court. Though we can decree only against the land-owners who are before the court, yet that will affect the lands; the 40l. a year ought to be apportioned among the owners, and the original decree may be carried against the occupiers land.

Decree a commission should go to inquire into and ascertain the value of the lands, the owner and occupiers names, and what proportion of the 40l. *per ann.* each tenement ought to pay.

[It was ordered by the court, as it appears by the decree-book, that a special commission should issue into the country, under the seal of this court, directed to such commissioners as the deputy remembrancer should appoint, to inquire who were the several farmers and occupiers of such part of the said inclosed lands, formerly part of the *Forest of Braydon*, which lie within the parish of *Cricklade St. Sampson*, in the county of *Wills*, and particularly what part of such lands each farmer or occupier severally held or enjoyed, and of what yearly values the respective lands so held by them severally were; the said deputy remembrancer to appoint the time and place of executing such commission; and the costs to be reserved.

In pursuance of the said decree, and the deputy's certificate, a special commission issued, and the commissioners returned their certificate, and certified the different lands, and the respective shares and values liable to the payment of the said 40l. *per annum*, as set forth in the said certificate.

Upon

1726.

Upon reading the said decree, order, and certificate, and the several depositions taken by virtue of the said commission, and upon debate of the matter, it was ordered by the court, that it should be referred to the deputy remembrancer to ascertain what part and proportion of the 40 l. *per annum*, due to the plaintiff from the defendants, each defendant ought to pay, according to the number of acres in his occupation; and what was due from each defendant to the plaintiff for the arrears of the said 40 l. *per annum*, according to the like proportion. The costs to be reserved.

In pursuance of the said decree, the deputy remembrancer made his report therein, dated the 12th of July 1728; and, on the 18th of July 1728, upon hearing counsel on both sides, and reading the decree and report; the court ordered the report to be confirmed, and the several defendants to pay to the plaintiff the several sums reported due to him, and all the defendants, except the *Wylwoods*, to pay to the plaintiff his costs of this suit, to be taxed, but the said plaintiff was to have no costs against the defendant *Wylwood*; and that the several defendants should for the future pay to the plaintiff 40 l. *per annum*, according to the proportions in the said report mentioned.]

P. 12 Geo. I. A. D. 1726. Scac.

Quilter v. Muffendine. [Gilb. Eq. Rep. 228.]

Non-residence
pleaded in
bar to a bill
for tithes.

A BILL was for a discovery of tithes by the lessee of a parson. The defendant pleads 13 *Eliz. c. 20.* against non-residence in bar. *Ward*, for the plaintiff, objected to the plea,

First, That it was bad in substance, for that it did not shew, that he was not of necessity, or justifiably absent, (barely saying he was voluntarily absent not being sufficient), as he might have done, according to *Butler* and *Godall's* case. 6 Co. 21 b.

Secondly, The time of absence the statute requires to avoid the lease is eighty days and more, which ought to appear to be a continual absence for eighty days altogether, and at one time. 1 *Bulstrode* 3. *Shepard v. Townslee, Moore* 436.

Thirdly, Though the plea should be thought good in substance, yet it could be no bar to the discovery, though it might as to the relief. To prove which he mentioned the case of a *modus* pleaded in bar to a bill for tithes, in which case it was held, that
although

although the plea was good as to the relief, yet it was no bar as to the discovery; but that the defendant must answer, and shew the quantity, quality, and value of the tithes; and the reason upon which that has been so resolved is, because if the defendant's plea in bar should prove to be false, the plaintiff then is to have a discovery from the defendant upon oath, and they will not let him run the hazard of losing such discovery, which he might do if the defendant should die in the mean time; and that in *Hilary* term last, the court would not allow a plea of the statute of limitation to be a good bar to a bill for tithes.

Fourthly, *Edlin* objected that they had set out the year wrong in the plea, and that it did not appear, that he was absent above eighty days in any one year, taking the year to commence according to the computation of æra upon the 25th *March*, as he insisted it might.

Bunbury and *Bottle* for the defendant, to what had been said, gave the following answer:

As to the first objection, that if he had any good excuse for his absence, it being a thing lying entirely within his own cognizance, they need not take notice of it, but he must shew it in his replication; and the whole court held the same.

Secondly, The construction they contend for would entirely defeat the statute, for at that rate he need only be there five days in the whole year. As to the opinion in *Bulstrode*, it is only that of two judges *obiter*; and as to *Moor* 436. the *in similibus ac pariter* are in the special verdict, but no notice taken of it, that it was necessary they should be in.

Thirdly, They distinguished this from a plea of a *modus*, for that admits the plaintiff's title to the tithes, but only avoids the payment of them in kind; for that by custom he was to have something else in lieu of them: in that case the demand is allowed to be just; and the only question is, in what manner that demand is to be satisfied? But the plea in the present case denies and defeats all the plaintiff's right and title to the tithes, and to any manner of satisfaction for them. The plea of the statute of limitation was also very different from this, for that statute could not be extended to a demand for tithes.

Fourthly, That the year was to be 365 days, without reckoning it from the 25th *March*; and they insisted upon the case of *Etheridge* and *Mills* [*supra*] in this court, being in point.

Gilbert

1726.

Gilbert chief baron. The case of *Etheridge* and *Mills* cannot be distinguished from this.

Secondly, The case of *Bulstrode* is not law; for that would defeat the statute *causa qua supra*.

Thirdly, That this was a good plea in bar, both as to the discovery and relief. As to the case of pleading a *modus*, that allows the plaintiff's title, and so that is pleading against what you allowed before.

The reason why the statute of limitations was not allowed to be pleaded in bar to a bill for tithes was, that tithes were not of the nature of those demands that are intended to be barred by the statute; besides, that plea allows the title. Years shall not refer to the æra, but must be intended a solar year of 365 days.

Price baron agreed the year shall be 365 days, and the absence any 80 days within that compass.

As to the second objection, how inconvenient it might be to allow such plea a good bar as to the discovery, for that supposing the plea to be false, if the defendant should die, the plaintiff might lose the benefit of a discovery, the answer was very plain; for the defendant having here shewed that the plaintiff has no title to the tithes themselves, he in consequence can have no title to a discovery concerning them.

Page baron. The plea of a *modus* is an acknowledgement of the title of the plaintiff, and is in part a discovery itself; for it sets out he is to pay so much for corn, so much for pigs, &c. and then it is nothing strange he should be compelled to go on a little farther, and shew the quantity and number of his corn, pigs, &c.

He took the distinction to be between a plea acknowledging the title, and one that absolutely denies it. If a bill be brought by an heir, claiming by descent against another, suggesting some fraud, and praying a discovery, there, if the defendant pleads he is a purchaser for a valuable consideration, such plea, which goes to the plaintiff's title, is always good, both as to relief and discovery. So, in case of a bill for an account against one as bailiff, suggesting fraud, if the defendant pleads, that at such a time he did account, he need not go on and set out an account. And he also agreed as to the computation of the year.

Hale baron. That the plea is a good bar to the discovery, and that the case of a *modus* had been rightly distinguished from this.

As to the statute of limitations, he thought it might have been pleaded in bar to the discovery, if it could have been pleaded at all, which it could not; for that specialties are not barred by the statute, and tithes are of a higher nature.

And he farther said, that no construction would be too liberal to make parsons reside, and take care of their parishes.

1726.

Tr. 12 Geo. I. A. D. 1726. Scac.

Somerville v. Wife. [Decree-Book, 5th July.]

BILL by the vicar of *Adderbury*, in *Oxfordshire*, for the tithes (*inter al.*) of hay, and of milk. The defendants, as to the tithes of hay in certain meadows, called *Lott Meadows*, insisted on a *modus* of 2 d. a mower or man's math, and 10 in proportion for any other quantity of meadow, in lieu of all tithes thereof, payable at *Michaelmas*. And with respect to the milk, they said, that the vicars had immemorially taken every tenth meal, or morning and night's milk, from all milch cows in the parish, from their first going upon the *common*, which happened usually on the 3d of *May*, for ten tithe meals or turns of morning's and night's milk, in lieu of all tithe milk. The court declared both customs to be void, and decreed the defendants to account.

A custom to pay 2 d. a mower or man's math, in lieu of tithe-hay, is bad.

Tr. 12 Geo. I. A. D. 1726. Scac.

Thompson v. Holt. [Decree-Book, 23d June.]

THE rector of *Loughton*, in the county of *Bucks*, claimed the tithes of garden stuff, apples, pears, pigeons, cows, milk, lambs, sheep, wool, faggots, furze, calves, and the loppings of oak, ash, and elm.

To a bill for tithes of gardens, apples, pears, pigeons, cows, lambs, and wood.

sheep, wool, fuel, calves,

The defendant *Holt*, said, that he held an ancient garden in the said parish; but that no tithe in kind was due to the rector for the fruit thereof; for that, time out of mind, gardens in the said parish had paid, and ought to pay, to the rectors of the said parish, at *Easter* yearly, one penny, called a garden penny, in lieu of all garden stuff or fruit (except apples and pears) yearly arising in such gardens; and he tendered the same, with his proportionable costs. He also admitted, that he had several dozen of pigeons; but denied

The defendant says, that for all vegetables and fruit, except apples and pears, a garden penny is payable yearly;

that

1726.

that no
tithe is due
for pigeons ;

that there is
a *modus* of
2 d. for
every new
milch cow,
and 1½ d.
for every
old milch
cow fed in
the com-
mon-fields,
in lieu of
the tithe
milk there-
of ;

2½ for a
lamb ;

of 8 d. a
score for
sheep wintered
in other pa-
rishes, in
lieu of tithe
wool ;

1 d. for all
fire-wood
cut on
Loughton
Common,
and burnt
in the fa-
mily ;

that no
tithe is due
for wood
cut in the
hundred of
Newport
Pagnell ;

that there is
a *modus* of
1½ d. for
every calf
weaned.

that he had sold any ; and insisted, that no tithes were due for them. He also admitted that he had several cows, which he had kept sometimes upon his inclosures, and sometimes in the common-fields belonging to the said parish ; and insisted, that he was not accountable to the plaintiff for the tithe of such milk as was milked from the cows while they were depastured upon the common-fields ; for that, time out of mind, there had been due and payable to the rector of the said parish for the time being, at *Christmas* yearly, for every new milch cow, 2 d. and for every old milch cow, 1½ d. depastured on the common-fields, which he, by his answer, tendered accordingly, as also a tenth part of the value of the milk milked from his cows while depastured on his inclosures, with his proportionable costs. He also set forth that he had two lambs, and tendered the plaintiff a halfpenny a-piece for them. He also stated, that in *April* 1723, he had brought into the parish several sheep that had been wintered in other counties, and were by him shorn in the parish in that year ; but he insisted, that he was not accountable for the tithe wool of them ; for that, time out of mind, there had been due and payable, at *Christmas* yearly, 8 d. a score, and so proportionably for a greater or less number which were so brought into the parish, and not wintered there, in full satisfaction of the tithe wool of such sheep so brought in. He also said, that in the said year he had caused several hundreds of furze faggots to be cut upon *Loughton Common* ; that some thereof were sold, and the rest burnt in his family ; and that there had been due and payable, at *Easter* yearly, to the rector of the said parish, one penny, called a smoke penny, in lieu of all wood, furze, and fuel, burnt and spent in the house of every inhabitant within the said parish ; and he tendered the same by his answer, with his proportionable costs. He also said, that the said parish of *Loughton* lay within the hundred of *Newport Pagnell* ; and that no tithe for wood of hedges, hedgerows, bushes, willows, and furze, which were either sold, or used for firing, were ever paid within the said hundred ; that he had lopped from oak, ash, and elm trees, of above twenty years growth, several hundred of faggots ; had sold some, and spent the rest in his family ; and insisted, that no tithe was due for the same, or any thing in lieu thereof. He also set forth an account of his calves, and the price for which he had sold them ; and stated, that two thereof were weaned for the pail ; and he insisted, that a *modus* of 1½ d. a calf for each calf weaned for the purpose aforesaid was due

to the rector in lieu of the tithe of such calves, which he also tendered to the plaintiff.

1726.

The other defendants, by their answers, also insisted upon the said *modus*.

The court ordered the defendants to account for tithe milk in kind during the time the defendants' cows were kept on their inclosed grounds and pasture lands; for the tithes of their wood and furze (except for the loppings and toppings of timber trees above twenty years growth, or burnt in their houses, or used in fencing); for the tithes of apples and pears, lambs, *Easter* offerings, pigeons sold, and such dry cows as were altogether unprofitable, and through which no tithe did otherwise accrue to the rector of the parish; but as to the other matters, they were ordered to account, according to the *modus* set forth in the answers.

The tithes of milk from cows fed on the inclosures, and of wood, furze, fruit, pigeons, and dry cows, decreed.

Tr. 12 Geo. I. A. D. 1726.

Berney v. Chambers. [Decree-Book, fo. 430.]

THE bill stated, that the plaintiff sent a cart and horses to fetch away the tithe of wheat; that the cart being loaded and going out of the field the defendant locked up the gate, and would not suffer it to be drawn out, but at length permitted the horses to go out, but stopped the cart, and that on the third day after, the plaintiff was obliged to take away the same by replevin, whereby he suffered great damages, and brought his bill for the value of the tithes. The defendant, by his answer, confessed, that he on the *Saturday* stopped the cart and horses as they were carrying away the tithes, and locked up the gate, they being trespassers and damage-feasant, because the cart wheels were shod with iron, which, as he was advised, ought not to be, because such wheels cut the soil and much spoiled the clover sown among the corn, but he permitted the horses to be taken away immediately: that being told he could not justify the detaining of the cart, he on *Monday* morning early sent notice to the tithe-gatherers that they might take away the cart, and tendered 5s. for damages for stopping it, but the plaintiff would not take it away till *Tuesday*, when he brought a replevin: that he had since offered to pay the charges of the replevin. The court ordered the deputy remembrancer to inquire into the damages sustained by the plaintiff by the defendant's stopping his cart and horses.

1727.

P. 13 Geo. I. A. D. 1727. Scac.

Marston v. Cleypole and others.

The statute of limitations, 21 Jac. I. c. 16. not pleadable to a bill for tithes.

BILL by a lay impropriator for tithes for about twenty-four years.

The defendant, as to such part of the bill as prays discovery and relief, for any time before six years next before the filing the bill, or serving the *subpœna*, pleads the statute of limitations, and that he did not promise to make any satisfaction for any tithes before the said six years.

This plea was now argued, and over-ruled by the whole court; for the defendant, as to the tithes, is in nature of a receiver or bailiff for the plaintiff, in which case the statute of limitation does not operate.

Tr. 13 Geo. I. A. D. 1727. Scac.

Quilter v. Lowndes. [Bunb. 211.]

Plea of verdict and decree in bar of demand for tithes, allowed. *Bokenhan v. Bentfield*, *Ibid.* S. P.

DEFENDANT pleads that he preferred his bill in the court of chancery to establish the *modus*, &c. that issues were directed and found for the *modus*, and decreed thereupon to be established, and pleads the same verdict and decree in bar of the plaintiff's now demand; and the plea was allowed by the whole court.

H. 1 Geo. II. A. D. 1727-8. Scac.

Berney v. Chambers. [Bunb. 248.]

Answer amended by increasing the number of acres, after issue joined, upon payment of costs, re-swearing answer, and taking out a new commission, at party's own expence, but very unusual.

LEAVE was given to amend an answer to a tithe bill, wherein the defendant had sworn, that such a close contained nine acres, by making it seventeen, though issue was joined, and a commission had issued (which the reporter never knew done before); but it was upon the defendant's paying all the costs since the answer, swearing the answer over again, and taking out a new commission at his own expence (e).

(e) But in a subsequent case of *Mr. Wortley Montague v. —*, the court refused to let the defendant amend his answer, by only altering the day of payment of a *modus*, although issue was not joined, and the day set right in a cross-bill. *Id. ibid.* As to amendment of answers, *vide* 1 *Enc. Abf.* 170-1. 5th edit.

M. 1 Geo. II. A. D. 1728. B. R.

Fletcher v. Wilkinson. [MSS.]

SERJEANT *Comyns* moved for a prohibition to the spiritual court to stay a suit there for tithes in kind of wool; suggesting a custom for paying the tenth pound of wool, and not the tenth fleece, as demanded by the libel in the spiritual court.

Per cur. This is no *modus*, but only a different way of paying tithes in kind. And where the custom suggested appears to be void, unreasonable, or insufficient, the court will not grant a prohibition. And the motion was denied.

H. 2 Geo. II. A. D. 1728-9. Scac.

Stone v. Rideout and others. [Bunb. 262.]

BILL brought by a lay impropiator for tithe-hay in the parish of *Framfield*, in the county of *Sussex*, who derives title under a grant of 3 *Jac.* 1. which expressly grants the tithes of hay.

No tithe having been paid for 120 years, bill for them by impropiator under a grant of *Jac.* 1. dismissed.

To this bill the vicar was made a party, and the plaintiff had no proof that he, or those under whom he claimed, ever had received tithe-hay. The defendants (parishioners) insisted he was only entitled to corn and grain, and that the vicar was entitled to tithe-hay; though there was no evidence, that tithe-hay had ever been paid either to the impropiator or vicar, but the farms of the defendants were under ancient *modus*es or customary payments; and the defendants insisted, that the hay was covered under the *modus*es; and to corroborate this gave several instances of payments of *modus*es to the vicar by several parishioners, who had nothing but meadow ground, and, consequently, could pay only for the tithe of hay.

This cause was this day heard, and though there was no proof of payment of tithe-hay in kind to the vicar, but only presumed to be so by the *modus*es; yet, since there was no instance of the impropiator's having received tithe of hay for one hundred and twenty years since the grant of *Jac.* 1. the bill was dismissed by the whole court.

1729.

Tr. 2 & 3 Geo. II. A. D. 1729. In Chan:

Carleton v. Brightwell. [2 P. Wms. 462.]

A *modus* for tithe of corn, for the inhabitants of such a tenement, and the lands therewith usually enjoyed, void in the opinion of his honour the master of the rolls for uncertainty, in regard the tenements may be uninhabited, and the lands afterwards shifted, and let with other farms.

IN a bill for tithes, in kind, the defendant insisted upon several *moduses*, one of which was, that the inhabitants of such a tenement, with the lands usually enjoyed therewith, had been accustomed to pay such a *modus* for tithe-corn (*f*).

Court. This is quite uncertain; the house may fall down, or be uninhabited, and then no *modus* will be payable. Also, nothing can be more uncertain, than lands usually enjoyed with the tenement, since the lands let with a farm-house may probably be often shifted.

Turkies tithable, but if tithes are paid of eggs, then none to be paid for chickens. Partridges.

2. Tithes being demanded of turkies, it was objected that in *Meor 599*, (*Hugton v. Prince*,) it was said, that turkies were things *fera natura*, and not tithable any more than partridges, and that turkies were not brought hither from beyond sea before queen *Elizabeth's* time.

Court. I cannot see, but that turkies are birds as tame as hens or other poultry, and therefore must pay tithes. It is true, if tithes be once paid of eggs, there can be no demand made a second time in respect of the chickens hatched afterwards.

3. There was another demand made by the bill of the tithe of corn mills, and it was insisted that every tenth toll dish was due. *1 Show. Rep. 281. Gumble v. Falkingham, Carth. 215.*

Mills are tithable, but they are to pay only a personal tithe of the clear gains, after all manner of charges deducted.

But it was replied, that this matter was determined in the case of *Chamberlaine* against *Newte*, in the house of lords, upon an appeal from a decree of the court of exchequer, where the bill was brought for the tithe of a malt mill in *Tiverton in Devonshire*, and

(*f*) By the registrar's book no such *modus* for tithe-corn appears to have been in question in the cause; but the defendants, by their answer, insisted that "all occupiers of farm-houses below or on the north side of a lane called *Burfield Lane*, with the lands usually occupied therewith, have time out of mind paid 3 d. at *Michaelmas* in each year for each cow, and all occupiers of farm-houses above the same lane or on the south side thereof, with the lands usually occupied therewith, have time out of mind paid 2 d. yearly for each cow," in lieu of tithe of milk in kind. His honour declared this *modus* to be uncertain, and directed an account. Reg. Lib. A. 1727. fol. 47. 2 Cox's P. Wms.

where

where the lords determined, with the assistance of eight judges (whereof *Holt C. J.* was one) that mills were tithable, but that the same was a personal tithe, and so ought to be paid out of the clear gain, after all manner of charges and expences deducted; upon which authority the master of the rolls decreed the mill in question to pay tithes, but that they should be paid only as a personal tithe.

Note. In this case it was said and admitted, that in a bill brought by a parson for tithes, though the right thereto be never so plain, yet in the exchequer the decree is not, that the defendant shall pay tithes for the future, but that he shall account for and pay what tithe is due to the time of bringing the bill, but in the court of chancery, it is to the time of the decree (*g*).

In a bill for tithes in the exchequer the court never decrees payment of tithes for the future. but chancery does.

1729.

Tr. 2 & 3 Geo. II. A. D. 1729. Scac.

The Bishop of *Hereford* v. the Duke of *Bridgewater*. [Bunb. 269.]

DOCTOR *Egerton*, bishop of *Hereford*, who had preferred a bill for tithes against his brother the duke of *Bridgewater* and several tenants of his manor, moved to have an inspection of the court rolls of the manor to see what proportions they paid of a *modus* insisted on; but denied by the whole court.

Motion to inspect books of defendant's manor, to see what proportion of tithes was paid, denied.

M. 3 Geo. II. A. D. 1729. Scac.

Price, Clerk, v. *Pratt* and others. [Bunb. 273.]

THE plaintiff preferred his bill, as perpetual curate of *Berrington*, being a chapel annexed to the church of *Hemel Hempstead* in the county of *Hertford*, against the defendants, inhabitants, and occupiers of lands within the said chapelry. He made his title under a nomination to his curacy in the year 1716 by *Cornelius Price*, then vicar of *Hemel Hempstead*, who also gave him by the same instrument the small tithes in *Berrington*, with power to sue for them in his (the vicar's) name; and he also set forth a licence to preach from the then bishop of *Lincoln*; and also that *Topping* (*Price's* successor) in June 1722, granted him a new nomination to

Curate, though made perpetual, being removable at pleasure, cannot sue for tithes.

(*g*) Vide Archbishop of *York* v. *Stapleton*, 2 *Atk.* 136, and *infra*; and *Bell* v. *Read*, 3 *Atk.* 590, and *infra*.

1729.

this curacy, expressly for life, with like power to sue for the small tithes in both their names ; but though he took a second nomination, yet that by the first and the bishop's licence, he was sufficiently entitled to the tithes, because by such nomination he became perpetual curate.

But by the court, (lord chief baron *Pengelly*, and baron *Carter* only in court) the bill must be dismissed, for no title appears in the plaintiff ; for though a curate is appointed by a vicar, either generally, or expressly for life, yet such appointment is, in its own nature, revocable by law, even without any cause assigned, and by the ecclesiastical law upon cause shewn ; so that the plaintiff had not such a permanent interest as to claim any tithes.

Nota. By baron *Carter*, if a bishop grants such a licence to a curate to preach, and after is translated, there is no necessity for a new licence by the succeeding bishop. But *quære* this, for it seems otherwise.

Nota. In this case *Topping* was made a party, but not brought to hearing, which, by the court, must have been done before the plaintiff could have a decree, if he had had a title in the other respect.

M. 3 Geo. II. A. D. 1729. Scac.

Quaintrell v. Wright [Bunb. 274.]

Usage as to
tithes shall
explain a
lease of a
farm, with
all tithes,
against the
very words.

PLAINTIFF brought his bill as lessee of the bishop of *Norwich* of the rectory of *Ingham* in the county of *Norfolk*, and produced his lease dated *May 8, 1723*. The defendants set forth, that the bishop of *Norwich* at *Michaelmas* in the year 1693 demised the *Grainge* farm with all tithes thereto belonging or therewith usually letten ; that this lease was surrendered *July 7, 1724*, and a new lease made the next day by the bishop of *Norwich* to the person under whom the defendants claim with the same words ; so insist, that at the time of the grant of the rectory the tithes could not pass to the plaintiff (of this farm) they being before expressly granted by the lease in 1693, which was subsisting at the time of the plaintiff's lease.

But note, there was proof that the lessees of the rectory had usually received the tithes of the whole parish, farm and all, and no proof on the defendant's side of the lessees of the farm ever receiving tithes.

Therefore

Therefore by the court (lord chief baron *Pengelly*, and baron *Carter* only in court) the defendant was decreed to account ; for usage shall explain this matter ; and these tithes cannot be said to belong to *Grainge* farm, or to be usually letten with it ; and the word tithes was taken in only as a word of course, and from the old lease : if there had been a dispute between the bishop himself and the lessee of *Grainge* farm, it might have had another consideration.

1729.

H. 3 Geo. II. A. D. 1729-30. Scac.

Hayes v. Dewse. [Bunb. 279.]

THE court seemed to think, that vetches and clover cut green, and given to cattle used in husbandry, should pay no tithes.

Vetches and clover cut green, and given to cattle of husbandry, pay no tithe, as it seemeth.

H. 3 Geo. II. A. D. 1729-30. Scac.

Woolferston v. Mainwaring and others. [Bunb. 279.]

BILL by the rector of *Drayton Bassett* in the county of *Stafford* for tithes. The defendant insists, that the lord of the manor, time out of mind, for himself and his tenants, on *Ascension-day*, gave and delivered to the rectors nine cart loads of logwood in lieu of all tithes ; and by the whole court, adjudged a good *modus*, as well as a *modus* of a hogthead of cyder, which is equally uncertain, yet both held to be good.

Moduses of nine cart loads of log-wood ; an hogthead of cyder ; and 2 d. an acre ; all held good.

Nota. In this case one of the defendants insisted on a *modus* of 2 d. an acre for eighteen acres, but set forth no day of payment, nor by whom ; but this being likewise found for the defendant, was established, being after a verdict : *which note.*

H. 3 Geo. II. A. D. 1729-30. In Chan.

Chapman and others v. the Bishop of *Lincoln*, *Mounson*, and *Dobbs* ; *et e contra.* [Mos. Rep. 266. 279.]

MR. *Willes* for the plaintiffs. This bill is brought by the plaintiffs, the occupiers of several parcels of meadow and pasture ground in the parishes of *Burgh* and *Winthorpe* in the diocese of

A *modus* for out dwellers to pay 4 d. an acre for the tithe of hay, and the

herbage of pasture lands occupied by them in the parish, is good. Eq. Caf. Abr. 367. pl. 2. Fitzgib. 119. pl. 5. 2 P. Wms. 565. Barnard K. B. 293. S. C.

X X 4

Lincoln,

1729-30. *Lincoln*, against the bishop of *Lincoln* who is seized in fee of the impropriated tithes, Mr. *Mounson*, lessee of the bishop for three lives, and Mr. *Dobbs* his under-tenant, for the establishment of two *modus*es; and Mr. *Mounson* files his cross-bill, to have tithes paid to him in kind. One *modus* is, that it has been a custom, time out of mind, for the occupiers of land in *Burgh*, and who do not reside in *Burgh* or *Winthorpe* (*b*), to pay 4 d. an acre for the tithe of hay (*i*), and the herbage of pasture lands, not ploughed or sown, on *Good-Friday*, or so soon after as demanded. The other *modus* is, that all those who occupy lands in *Winthorpe*, and are not inhabitants of *Winthorpe* or *Burgh*, should likewise pay 4 d. an acre, &c. and the plaintiffs, though they occupy lands in the parishes of *Burgh* and *Winthorpe*, yet they live in other parishes. The *modus* does not relate to those that reside, but to those that have lands, and are not resident; these two parishes contain near eight thousand acres of land near the sea, and the inhabitants are not sufficient to cultivate and manure them, so these *modus*es were settled to encourage the inhabitants of the neighbouring towns to occupy the lands. They pay likewise and contribute to all the parish duties; the same custom is observed in several adjoining parishes. We have proved a payment of this *modus* for fifty years, and that the parishioners who paid tithes in kind, on their removal to other parishes, have paid only this *modus*; and the defendants have not been able to prove, that tithes in kind have ever been paid: and therefore as our evidence is sufficient, we have a right to have these *modus*es established. If the defendants deny these *modus*es, the court will first enter into the proof of them; and if they are not fully satisfied with the depositions, will send them to a jury; but, if they insist they are not good in law, they must admit them to be well proved. And this is the constant course of the court of exchequer, and it was lately so resolved in *Gwarvas's* case to establish a *modus* for fish, because they would not trouble themselves to give their opinion on an uncertain fact.

Mr. Solicitor General for the defendants. We have two defences, and if we prevail in either, the court must decree for us that there are no such *modus*es, or, if there are, that they are not good in law. But they say, if we controvert the legality, we must admit the *modus*. But the old course of the exchequer was, to

(*b*) It appears by the *Liber Regis* that these two parishes are united.

(*i*) In *P. Wms.* it is "in satisfaction for all tithes;" and in *Eg. Ca. Abr.* it is "in lieu of tithes of those lands." Mr. Cox has not varied the statement in *P. Wms.* in his edition of that book, therefore I take it to be correct.

consider the legality of the *modus*, on a supposition it was proved, and not on admission of it; and why should the court put the parties to the trouble and expence of trying a thing that is not material? By these *moduses* a difference is made between inhabitants and strangers in a manner I never heard. In cases between residents and out-dwellers, the *modus* is generally in favour of the parishioners; and what reason is there for these *moduses*? Why must the first extend to all strangers, but those that live in *Wintorpe*, and the second, to all but those who live in *Burgh*? And they cannot be good in law, because it would depend on the occupier, whether he would pay tithe in kind, or not.

A man indeed, by changing the course of his husbandry, may change the nature of the tithe; for he cannot be supposed to do it to defraud the rector, but it must be presumed, that every man will turn his land to the best advantage. But here, though the land continues in the same plight and condition, the tenant by removing out of the parish has it in his power to alter the tithe; and in 1 *Lev.* 116. *Bawdry* against *Busbel*, a prohibition was moved for on a suggestion of a custom, that all the occupiers and tenants of *Skegnes*, that were inhabitants of any place out of the parish, should pay to the vicar only 4d. a year for every acre; and it was alleged that the plaintiff occupied lands in *Skegnes*, but lived out of the parish. And the court denied the motion; because the custom was unreasonable to give a greater privilege to foreigners than to inhabitants, who are at a greater charge, in respect to their resiancy, to repairs and vestments for the church. This case is reported likewise in 1 *Keb.* 602. *Caf.* 76. and it is there said *per curiam*, that this was an unreasonable custom, and only invented by the country, to cheat the parson, and that it was a leaping custom, not fixed to any person certain, or to the land, nor of any permanence; and by *Keeling*, there is no precedent of any *modus* so variable and dancing. And this case shews, that the court, on a supposal of the fact, determined the law before the *modus* had been proved, and would not let them try the *modus*, because it was void in law. These *moduses* are in favour of foreigners, and would subject the rector to the greatest frauds; they have not proved that they contribute as much as parishioners to the charges of the parish, and why then should they be eased as to the tithes? And it is unreasonable, that by their removal the impropriator only should be a loser.

1729-30. Lord Chancellour. It is contrary to the rules and methods of all courts to determine the law, until the fact is either admitted or proved: on a motion for a prohibition, the court is not possessed of the cause, which makes the difference; but, if it is once granted, the defendant must either demur, whereby he admits the *modus*, or plead the general issue; and if the fact is found against him, he has afterwards the benefit of the law. The court therefore declares, the plaintiffs have proved the *modus* to their satisfaction; but having a doubt, whether they are good in law, will be assisted by two judges on *Monday* next, and defers giving an opinion until that time.

Mr. Solicitor General for the defendants. The question is, Whether these *moduses* are good in law? There is something on the face of them extremely particular; they do not draw a line between the parishioners and the out-dwellers, but he that lives in either of the parishes in question, and occupies lands in one of them, pays tithes in kind; but, if he lives in neither of the parishes, he pays only 4 d. an acre.

No rule is more established that relates to a *modus*, than that it ought to be certain in respect of the lands, the person, the time, and the sum; and that it ought to be as certain as the tithes in the room of which it comes. But this *modus* is uncertain in all these respects: if to-day the lands are occupied by the inhabitants of either of the parishes of *Burgh* or *Wintborpe*, tithes are to be paid in kind; if to-morrow they are occupied by strangers, this *modus* only is due. Suppose these lands were jointly occupied by two, one of whom lived in either of these parishes, and the other in neither of them, how are they to pay tithe? either both the tithe in kind, or both a *modus*? or one of whom lived in either of these parishes, and the other in neither of them, how are they to pay tithe? either both the tithe in kind, or both a *modus*? or one tithe, and the other a *modus*? or suppose the occupier lives one time of the year out of these parishes, and the other in one of them, what is he to pay? And is a *modus* to depend on the residence of the occupier, which is variable and uncertain, and entirely in his own breast? The proprietor could not follow so variable a right.

And as a *modus* ought to be certain, so it ought not to be subject to any fraud: tithes must follow the nature of the lands, and only change as they do; but here the change depends on the will of the occupier, whether he will reside or not. How is it possible

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for the rector to deal with these people for his other tithes; if they cannot bring him to their terms, they will threaten to remove to another parish, and may cheat him by removing only to the other side of the hedge; and we have proved this to have been really done, and that one went and built a house on the other side of the road in another parish. 1729-30.

As these *modus*es then have no reason to support them, and are liable to this fraud, and we have proved it to have been put in practice, your lordship will not establish them.

They say there are like customary payments in *Skegnes*, and other neighbouring parishes, with this difference, that the *modus* extends to all strangers. But the custom as to *Skegnes* was adjudged at law to be a void custom, 15 Car. 2. in the case of *Bawdrie v. Bushe*. 1 Keb. 602. Case 76. 1 Lev. 116.

Mr. *Lutwyche*. There must be a certainty in a *modus*, that the parson may know what to demand, and it may be sued for in the spiritual court; but can any one tell in this case, what the parson will be entitled to? A *modus* supposes an ancient contract to have so much yearly in lieu and discharge of tithes, and it must be perpetual; but this custom is defultory.

There ought to be a certain and perpetual rule for the parson to go by in his demand. This *modus* is uncertain too, as to the place. It may be converted to arable land, and then it must pay tithe; but, when it is pasture or meadow, by only stepping into the next parish the occupier, instead of paying tithe is only to pay this *modus*; and the parish may combine together; "you shall live in my house, and I will live in your's;" and there is no reason or foundation for this custom. If any privilege is to be allowed to the occupiers, the parishioners ought to have it in respect of the burthen some offices they undergo; and as this is a discouragement to the inhabitants, so it is a loss to the parson too; for the more inhabitants there are, the greater are his small tithes. In the case of *Bawdry v. Bushe*, the court were so clear as to the illegality of the *modus*, they would not grant a prohibition; and this case is stronger, because the plaintiffs pray to have these *modus*es established.

Mr. *Peere Williams*. Tithes are the revenue of the church, and due of common right, which it is unreasonable the parson should be defeated of by the act of the tenant, and so slight an act too, as a removal; whereas no *modus* is good that depends on the act of the party, without it be some benefit to the parson. *J. Rel. Abr.*

1729-30. 649. to repair and beautify the body of the church, and to find necessaries for it, is no good *modus*, because the parson has no advantage by it, yet that is a pious and expensive work; but what does the parson gain by the removal, or what expence is the party put to? and though a reasonable commencement, if it cannot be shewn, it is not a good *modus*. The *modus* is to arise, though the occupier takes only a lodging in another parish, and though he leaves his house empty; what reason, what foundation can be given for it? it tends to depopulate and desolate a parish, for interest will always be a prevailing motive: a good *modus* must arise from the consent of the parson, patron, and ordinary, but how can we ever suppose the parson would consent to these *moduses*?

It is a rule as to a *modus*, that no custom introductive of fraud is to be allowed. 1 *Leon.* 99. *Stebbs v. Goodlack*, the custom was, that the parson should have for his tithes the tenth land sowed with any manner of corn, and he was always to begin his reckoning at the first land that was next to the church, &c. The parson shewed that the defendant by fraud and covin sowed every tenth land which belonged to the parson very ill, and with small quantity of corn, and did not dung and manure it as he did the other nine parts, by means whereof, whereas the other nine every of them yielded eight cocks, the tenth yielded but three cocks; and for this matter the parson libelled in the spiritual court, and confessed the custom, but for abusing the custom, prayed to have his tithes in kind. The defendant prayed a prohibition, and the parson a consultation, and the opinion of *Wray* chief justice, was, that the custom was against common reason, and so void. *Cro. El.* 446. It was adjudged in *Sir Charles Morison's* case, quoted in the case of *Gryfman* against *Lewes*, where one prescribed to pay the tenth part of corn in the sheaf, for the tithe of all which is in sheaf, and of all which is raked, that this was an unreasonable prescription, for then he may put the less part in sheaves, and leave the greater part to be raked.

Another rule is that a *modus* ought to be certain and permanent. 2 *Salk.* 657. *Startup* against *Doderidge*, a *modus* to pay 2 s. in the pound of the improved rent was held naught, upon a motion for prohibition, for that is to rise and fall as the land is let, and the parson cannot know it.

And this custom is unreasonable, as it gives a greater privilege to foreigners than inhabitants. 1 *Lev.* 116. and though the reason given in that book is not law, yet the inhabitants are subject

to

to burthen some and expensive offices, from which non-residents are exempt; for by the 43 *Eliz.* the overseers and churchwardens are to be chosen out of the inhabitants, and therefore there is more reason to favour them. Is leaving the parish a good consideration? the plaintiffs do not set out for what time there must be a non-residence: will a week or a fortnight be sufficient?

Mr. Attorney-general for the plaintiff. Notwithstanding the defendants have said that a *modus* ought to be more clear and positive when the plaintiff prays to have it established, than when it is set out by way of defence, yet in both cases it must be proved, and must be good in law, which is sufficient. We have proved these *moduses* beyond contradiction, and the defendants have not produced one instance that tithe was ever paid in kind, and therefore they must shew very strong arguments against the legality of them, and after such long usage they must not be set aside on slight grounds, to the prejudice of those who have purchased the lands, and whose interest must be considered as well as the parson's.

Two things are necessary to a *modus*; 1st, immemorial usage, and payment of *quid pro quo*, which we have proved; and secondly, a reasonable commencement. And it is sufficient to shew that a *modus* might have a reasonable commencement, though we cannot possibly prove what was the reason of it. The fact is, that these large parishes contained a much greater quantity of ground than could some years ago be occupied by the inhabitants; therefore that the lands might not lie waste, which would be a loss both to the parsons and owners, for the encouragement of strangers to occupy these lands, and that the parson might have something, the parson, patron, and ordinary came to an agreement with them for the payment of this annual sum, and it is sufficient for us to shew, that this might have been the reason for these *moduses*, but it is not necessary for us to prove it was so.

As to the case in 1 *Lev.* 116. the law makes no difference, whether the *modus* tends to the encouragement of the parishioners, or of strangers, and if the custom had extended to all strangers, it would have been more prejudicial to the parson, and the reason of it might have been to prevent any fraud from the two parishes lying so contiguous.

Most of the defendants objections arise from the case of *Bawdry* and *Busbel*, but no conclusion can be drawn from that case that will govern this. *Kehle* has not set forth the *modus* for pasture and meadow ground, but generally for every acre of land.

Their

1729-30. Their first objection is, that these *modus*es are unreasonable, but I have shewn there might have been a very good reason for their commencement, and therefore such objection to them is of no weight, and the same might be made to many *modus*es, which have been adjudged good in law.

Secondly, it is said that these *modus*es were invented to cheat the parson: but this is no objection unless they can prove that such a use has been made of them, that the occupier removed on any quarrel with the impropiator, or to distress him, as to the other tithes. All *modus*es are liable to fraud, but it is not easy for the parishioner, or probable, that he would leave his abode on this account, and he would lose more by quitting his house, than he could save by the tithes.

Thirdly, they say these *modus*es are not certain, as to the persons, or as to the lands; but a prescription for a *modus decimandi* need not be more fixed than for a *non decimando*. The Cisterians were discharged of tithes *quamdiu in propriis manibus*, &c. which was a variable prescription as to the persons; why may not lands be liable either to pay tithes or a *modus*, in respect of the occupiers as well as by course of husbandry? *Godbolt* 194. *Brown's* case there was a *modus* for tithe-hay in a particular field which was sowed for seven years. That does not destroy the *modus*, but the rector shall have the tithes of the corn, the vicar the *modus* for the hay. It might be said in that case, shall it be in the power of the occupier, whether he will pay tithe in kind or not, or to whom he will pay it? that is as variable and dancing as the present custom, and puts it also in the power of the occupier to whom he will pay.

Such a *modus* has been allowed good at law. In *Cro. Eliz.* 136. *Cotesford* against *Pease*, the parson sues the defendant for tithe in specie of certain pasture in *N.* the defendant for a prohibition surmises that he was an inhabitant in *S.* and that time out of mind every inhabitant there that had pastures in *N.* had paid tithes for them to the vicar of *S.* and that the vicar of *S.* had paid the parson of *N.* 2d. for every acre, and the court held, that the prohibition did lie: for it is, as if he had prescribed to pay 2d. for every acre, *Cro. Eliz.* 136. and there are many cases in the exchequer, in which this *modus* has been established.

The case in *Rolle's* Abridgement, that the occupiers use to repair and beautify the church, and therefore ought not to pay tithes, amounted to a *non decimando*; but here the parson has 4d. an acre.

The

The case of *Startup* and *Doderidge* was to pay 2s. in the pound of the rack-rent or best improved value, which was uncertain, here the sum to be paid is fixed and certain. 1729-30.

Mr. *Willes*. The constant usage proves that there was such a contract, and we have proved that the same *modus* has been constantly paid in the parish of *Skegnes*, notwithstanding the prohibition was denied in the case of *Bawdry* and *Busbel*. And the inhabitants have more benefit than strangers, they have the instruction of the minister.

The first objection is, that these *moduses* are uncertain, which has been fully answered; for they are as certain and permanent as many others which have been established. Where a *modus* is for tithe of hay, and if the lands are sown to pay tithe in kind; in that case the parson cannot tell before-hand, how much he shall have the next year; he cannot tell whether it will be mowed or sown, while the lands are occupied by a parishioner, &c. Tithes in kind are to be paid, if by a stranger 4d. &c. a *modus* is not permanent, when any one year nothing is to be paid to the parson, because that would amount to a *non decimando*; but here something must be paid. And these customs are certain as to the lands: they are for meadow and pasture ground; and as to the persons too, they must be paid by the occupier.

The second objection is, that they are liable to fraud. But *moduses* more subject to fraud have been established; for if they are made use of to cheat the parson, the court will relieve him, and make them pay tithes in kind, which accounts for the case of *Stabbs* and *Goodlack*, where the court would not grant a prohibition in support of a cheat, though the *modus* was confessed; but *Moor*, in the report of that case 913. case 1290. says, a prohibition was awarded, notwithstanding the *covin*, because the parson might have an action on the case for the fraud at the common law. The glebe does not pay tithes to the vicar, yet if the impropiator put cattle when yeaning on that land, the vicar shall recover the tithes because of the fraud, *Moor* 909. case 1277. *Cro. Eliz.* 467. *Moor* 863. case 1186. *Hob.* 39.

The other objection is, that the parson must have a benefit; so he has by these *moduses*. They cannot mean, that he must have as much as the tithe, for then the objection would run to all *moduses*, but that what came in lieu of the tithes must be paid to the parson himself.

Mr.

1729-30. *Mr. Cruise.* There are many precedents of such a *modus* being adjudged good, *Hill.* 16. c. a. 1. *Rot.* 1548. in C. B. 2 *Brown's* Entr. 194, 195, 196. The vicar libelled for tithes in the spiritual court, and a prohibition was granted on suggestion that strangers who occupied lands in the parish should pay the *modus* of 10d. an acre, and there are many decrees for the payment of such a *modus* in the court of exchequer. *Tr.* 12 *Car.* 2. *Piggot* against *Lovel*, the vicar brought his bill to be paid tithes in kind, and the defendant suggested a custom for foreigners to pay 4 d. an acre, for the tithe of meadow and pasture, and an issue was directed, and a verdict found for the defendant, and the bill was dismissed. Both these resolutions were prior in time to the case of *Bawdry* and *Busbel*, which was in the 15 *Car.* 2. and there have been many such decrees since that time too. *Hill.* 25 *Car.* 2. the rector filed his bill for such a customary *modus* of 6 d. an acre, and the *modus* was established. *Tr.* 30 *Car.* 2. a bill was brought for payment of tithes; the defendant pleaded such a custom as in this case, and two issues were admitted; one, whether there was such a custom; and the other, what lands the defendant occupied: and the court decreed accordingly. 32 *Car.* 2. The bill was brought for tithes, and the defendant pleaded a *modus* of 12 d. an acre for land newly converted to tillage, and 4 d. for ancient pasture. There the court were of opinion, that the *modus* was well proved, and ordered a case to be made for the opinion of the judges, who were of opinion, that this was a void *modus*, and certainly it was so, for being coupled with the 12 d. for the new converted ground, it could not be good. But afterwards, *Mich.* 2 *W. & M.* *Claxton* against *Langton*, the successor of the plaintiff brought a bill for tithes in kind, and the defendant insisted on the *modus* of 4 d. an acre. The plaintiff confessed the custom, but claimed the benefit of the former decree, and declared that to be his only inducement for bringing his bill. But the court declared it to be a good custom. In the case of *Roe* against the Bishop of *Exeter*, a *modus* to pay 2 d. a hog'shead for cyder was established. In *Rolle's* Abr. 649. pl. 8. 650. pl. 9. it is said the custom would have been good, if it had been to repair the chancel, because that would have been a benefit to the parson; here the thing to be paid is certain, and that is the certainty requisite in a *modus*. 1 *Keb.* 612. ca. 86. a prohibition was refused on suggestion of a *modus* to pay 4 s. for every ploughing is not good: but to pay so much for every day's work, with an averment of what is contained, and that it was certainly known, is good.

day's

It is a good *modus* for those who reside out of the parish to pay 10 d. an acre for the lands they occupy in it.

Ashfordby
v. *New-*
comen.
1 *Wood's*
Decr. 183.

Ashfordby
v. *New-*
comen.
1 *Wood's*
Decr. 207.

This *modus* was laid in the same manner as the preceding case between the same parties.
2 *Wood's*
Decr. 283.

Supra.

A *modus* of a d. a hog'shead for cyder is good.

A *modus* to repair the chancel is good.

A *modus* to pay 4 s. for every day's

ploughing is not good: but to pay so much for every day's work, with an averment of what is contained, and that it was certainly known, is good.

day's ploughing of wheat, and 2 s. for every day's ploughing of barley, for the uncertainty. But, if the *modus* had been so much for every day's work, with an averment that it was certainly known, and how much it contained, it would have had sufficient certainty. 1729-30.

Mr. justice *Fortescue*. I think there is no difficulty to determine this question, whether these are legal *moduses* or not, and I am of opinion that they are. First, I would observe on what *moduses* are founded. The books say they are real compositions; they are allowed both by the canon and civil laws; they are founded on agreements; they must be contained in some instrument, and if it is lost the parties are allowed to prescribe. And this was the reason lord chief justice *Holt* went upon in the case of *Startup* and *Doderidge*, (though he was against the *modus*) that as it was a contract between the parties, it was hard to break through it, when it was well proved.

But the defendants say, that these *moduses* are unreasonable. I have seldom known this objection made to a *modus*, because nobody can tell at this distance of time whether it was reasonable or not at its first commencement; but the law supposes it was, 8 *Ed.* 4. 13 b. But they are not unreasonable, they are an ease to the parson, for he is not bound to attend foreigners. But it is said, that they take more notice of foreigners than inhabitants. But was it not in the power of the parson, patron, and ordinary to give them what privileges they pleased? they create no burthen on the inhabitants.

But it is objected, that they are uncertain; and if they are, then indeed they are not good in point of law, for they would amount to a *non delinendo*. But can any case happen in which the parson will not either have this *modus* or the tithes? and there is no uncertainty, but what is to be paid on every contingency is fixed. In *Rolle's Abr.* 265. a *modus* to pay a shilling or thereabouts for every acre of arable land was adjudged uncertain. And as the customs are laid with relation to the parishes, they are an advantage to the rector, and a foreigner may come and reside in the parish, and then he will pay tithes, as well as one who occupies lands, and is a parishioner. Here is no uncertainty in the *modus*, but the only thing uncertain is, whether the *modus* or tithes in kind are to be paid?

In this case the parson has a benefit, he has 4 d. an acre, and I do not know but once it might be a fourth part of the value of lands. The *modus* to repair the church in lieu of tithes could not

1729-30. be good, because the parishioner was bound to do it without such a *modus*, and doing it was no benefit to the parson; but, if it had been to repair the chancel, it had been a good *modus*, for that would have been an advantage to the parson.

I cannot rely on the case of *Bawdry* and *Busbell*. It was determined on a motion, and the prohibition might be denied for other reasons; it is a strange resolution. Sure a man may give up his right on what term he pleases. And the reason mentioned in *Lea* is not good in law, for it is a settled point, that foreigners are bound to contribute to the repairs and vestments of the church, and to pay all parish duties, and Mr. *Creuse's* cases are expressly in point; and in the case of *Bate* and *Howland* decreed in the court of exchequer 1726, a *modus* to pay 4 d. an acre for high land, and 3 d. an acre for low land, was adjudged a good *modus*.

2 Wood's
Decr. 257.

Mr. justice *Reynolds*. A *modus* is a real composition run into a prescription, made *concurrentibus iis qui de jure requiruntur*, who might dispose of the rights of the church as well as private persons of theirs, and if the contracts now appeared in writing they would be good, and the memorials being lost, the parties may prescribe and shall have the advantage of them as if they appeared. If these customs were universal they would undoubtedly be good, and then the question will be, whether the restrictions shall make them void; and if they would be good generally, shall the parson object when the restrictions are for his benefit? and it cannot now be discovered whether the parishes were not formerly united, or did not partake of sacramentals. But, if these *moduses* are so uncertain, that the parson cannot know what to demand, I allow they are bad. All the certainty requisite to a *modus* is this, that when the circumstances are the same, there shall be the same *modus*. And it is not uncertain, because the parson is now to have a *modus*, and now to be paid tithes; for that is as certain as the cases of *non decimando*, where the parson has sometimes tithes, and sometimes nothing. And this is no loss to the inhabitants, they do not pay more, though the parson has less, and the surplus is not thrown as a load upon their estates.

The single authority for the defendants is the case of *Bawdry* and *Busbell*, which was determined on a sudden motion, and no rule given to shew cause, and is founded on reasons that are not law; and though we have the contemporary reports of *Siderfin* and *Raymond*, they take no notice of that case. And I believe the parties had recourse to another court that granted a prohibition, because the custom has subsisted in that parish ever since, notwith-

standing the prohibition was denied. And that case ought not to be regarded, since it stands single, in opposition to so many contrary resolutions both before and since that time, many of which authorities have been cited by Mr. *Crense*.

1729.

Lord Chancellour. I am of the same opinion. The plaintiffs have proved these *modus*es to be time out of mind, and the defendants have not produced a single instance of the payment of tithe in kind; and as they relate to so many parishes, it would occasion a great confusion to set them aside. Every *modus* supposes a composition, which being lost, runs into a prescription. Suppose the composition had been for all occupiers, by the case that has been cited by Mr. justice *Fortescue*, that would be good, and why should it make the custom unreasonable to restrain it to those that live out of the two parishes? does making the composition with part only of the occupiers make it illegal? they might contract with whom, and on what terms they pleased; and though *Keeling* in the case of *Bawdry* against *Bushell* says there was no precedent of such a *modus*, Mr. *Crense* has produced two resolutions before that time; but they not being in print, I suppose he had not seen them, and that case was adjudged on a sudden motion.

There is no uncertainty in these *modus*es, for then indeed no time or usage could make them good; they are no more uncertain than the prescription by the *Cisterians* in *non decimando*. Does not the tithe alternately belong to the rector or vicar, as they are great or small tithes? These customs therefore being no way uncertain, and having held so long, must be established on the original bill, and the defendant Mr. *Mounson*'s cross-bill for tithes in kind must be dismissed, without costs, in case he submits to the *modus*.

H. 3 Geo. II. A. D. 1729. Dom. Proc.

Gwavas v. Kelynack and others.

A BILL for the tithe of fish was preferred by the plaintiff, as owner of the impropriate rectory of the parish of *Paul*, alias *Pauli*, alias *Paulin*, in the county of *Cornwall*, which is an ancient rectory adjoining to the sea, and extending into *Mount's Bay*, and hath time immemorial been a fishing town, stating that within the said rectory and parish, there is, and time out of mind hath

Issue directed relative to the baron Hale, on a bill for the tithe of fish, payable by custom, to the impropriator, though the

defendants gave no evidence against the custom, and though a former decree in the cause had been acquiesced in for many years. 3 Brown, 479. pl. 69. Eund. 239. pl. 311. Id. 256. pl. 332.

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been

1729.

been used and approved the following custom, and which was insisted upon, *viz.* that every parishioner of the said parish, being proprietor or occupier of any fishing boat, fishing net, or other fishing craft, which has been usually tied, moored, or kept, within any part of the rectory or parish, (when not used in fishing) ought to pay to the impropriate rector the tenth part of all great and small fish taken in the bay or adjoining seas with such boats, nets, or fishing craft, (except fish used for bait fishing, and fish meashed in the sleeves of nets, called *saynes*); and the plaintiff set forth in his bill a decree obtained by his grandfather against about one hundred and thirty parishioners, which was made upon a very solemn hearing, and thereby the custom, as alleged (except as to the exception of fish meashed in the sleeves) was established.

The plaintiff also insisted, that, a year after the decree, one hundred and thirty of the then defendants, by indorsement on the decree, acknowledged the custom.

And from the time of that decree tithes were paid, agreeably to the custom, to the plaintiff's father during his life, and after his death, to the plaintiff's mother, who held the rectory, as her jointure, and from the time of her death, to the plaintiff himself, until the year 1722, when some of the fishermen refused to pay their tithes of pilchards and herrings caught in drift nets, and their example being soon followed by many others, the plaintiff, in *Hilary Term* 1724, exhibited his bill in the court of exchequer against the defendants (two of whom, *viz. John Tregurtha* and *John James*, were defendants in the former cause) for a discovery and satisfaction of the tithes of pilchards and herrings caught by the defendants since the 25th of *March* 1722 in *Mount's Bay*, and at or near *St. Ives Fowey*, *Mevagiffy*, and other fishing places, in the seas adjoining, by and with fish craft kept within the said rectory, as aforesaid. The bill charged the custom to be as above stated, and to have been established by the former decree, and that the defendants had so taken within that time great quantities of pilchards and herrings, but refused to pay tithes thereof, pretending that there was no such custom, especially near *St. Ives Fowey*, &c. or other remote fishing places, or in driving nets.

The defendants put in their several answers to this bill, and although, by the last of such answers, they said they had paid all their tithe fish to the plaintiff or his agents up to the 29th of *September*

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1724, yet by the first answer they denied, that they knew or believed that there was such a custom as aforesaid, of paying tithe, and insisted, that such custom was unreasonable, and that they hoped to be relieved from it, for that the defendants had no land in the said rectory whereon to moor their boats, and they were forced to pay others for such liberty, and also port farm to the duke of Cornwall, and were at great charges for boats and nets, which would not last above four years; whereas saynes, being used near the shore, would last a man's age, and that the tenth fish was sometimes half, and at other times the whole profit. They also insisted, 1. That the former decree was not binding on them, there being only two of the present defendants, viz. *John Tregurtha* and *John James*, who were defendants in the former cause; and they said, that they conceived that decree to be hard, and therefore not binding on them. 2. That the custom did not extend to driving nets, which of late years had been mostly used, and saynes neglected. 3. That it was unreasonable, to extend it to inhabitants and others, and into adjoining seas, out of the parish, and therefore prayed an issue.

But the plaintiff's counsel insisted, that here was sufficient foundation for a decree, without sending it to an issue. 1. The former decree being so solemnly obtained. 2. The indorsement by one hundred and thirty of the then defendants, two of whom were then living, and defendants to this bill. 3. Constant usage and acquiescence since until the year 1722.

Issue being joined, several witnesses were examined on both sides, and on the 3d of *July* 1727, the cause was heard; and though there seemed to be no evidence, by the defendants, against the custom, and though the plaintiff had the former decree signed by above one hundred and thirty parishioners, testifying their acquiescence in the decree, yet directions were given for trying the custom, and the court sent the plaintiff to an issue at law, *reluctante* baron *Hale*, at the next assizes for the said county; and in the mean time, the defendants were, by consent, to pay their tithes as usual, of late years, before the suit began, without prejudice.

In the next term, *Gwynas* prayed for a rehearing of the cause; because the custom, as set forth by his bill, was allowed and confirmed by the decree in his father's cause, which appeared to have been made on very solemn and mature debate, and to have been acquiesced in above 47 years; so that it was become very difficult to shew by living witnesses what the custom was previous to

1729.

that decree; and also, because it appeared through the whole series of depositions on both sides in this cause, that there was not the least colour or doubt, but that the tithes of pilchards and herrings caught in the codds of *Jaynes*, or the tenth penny of what the same had been sold for, had been continually paid; and that the only doubt, if any, was about the tithe of fish taken in the drift nets, which was a matter fully settled by the former decree.

On the 9th of *May* 1729, the cause was reheard.

The Lord Chief Baron, and *Comyns* baron, seemed to think this a sufficient ground, to decree for the plaintiff, *Hale* baron doubting; and upon great importunity of the defendant's counsel, who still insisted to try the custom at law, the court directed an issue, and that a trial should be had, at the bar of the said court, by a special jury of the county of *Middlesex*, to try, whether there was such a custom, as was laid and insisted upon in the bill, or not; which issue came on to be tried at *Westminster*, in the court of exchequer on 6th *November* following, viz. 1729, whereupon several aged witnesses brought from *Cornwall* were examined on the said trial, which lasted 14 hours, and after a long defence made by the defendants, the jury gave their verdict for the plaintiff, though the defendants gave pretty strong evidence, that drift nets were as ancient as *Jaynes*, and no tithes had ever been paid for drift fish; but the authority of the decree (when the matter was fully considered) and an acquiescence for forty-one years since, was too strong to be got over, and the verdict (which was to the satisfaction of all the court, but baron *Carter*) found that there was such a custom as aforesaid.

On the 5th *December* following the cause was heard upon the equity reserved, when the court declared that the custom was good at law, and decreed that the same should be established; and that according to such custom the defendants should account for the value of the tithe, or the tenth part of pilchards and herrings by them taken since the 25th of *March* 1722 to the time of exhibiting the bill; and that the plaintiff should have his costs both at law and in equity, to be taxed by the deputy remembrancer.

From this decree the defendants appealed to the house of lords, and on the behalf of the appellants it was contended, that by the variation of the first order of the decree, in directing the issue to be tried by a jury of *Middlesex*, instead of a jury of *Cornwall*, the appellants were put under great difficulties and disadvantages, in
bringing

bringing their witnesses from so great a distance as near three hundred miles, and especially such of them as were aged and infirm, and that a jury of *Middlesex*, who were entire strangers to the customs of *Cornwall*, and to the manner of fishing there, could not be so well able to judge upon the matter in issue, as a jury of that county; that the custom was unreasonable and void, inasmuch as it required the tenth part of the fish to be paid in kind, without any allowance or deduction to be made for the charges and expences in catching the same, or in providing boats, nets, and other fishing craft; whereas the tithes demanded in this case, could only be due by custom, and claimed as a personal tithe, and as such, all expences and charges of that kind ought to be deducted; but which, though it most commonly amounted to the half, and sometimes to the full value of the fish so taken, was not provided for by this decree, and though the mooring, tying, and keeping of boats, nets, and other fishing craft, in the parish, when not used, were assigned as a reason or consideration for the custom; yet the respondent did not find or provide any convenient place for that purpose, or contribute towards the charge thereof; but the appellants were forced, at their own expence, to procure proper places for keeping their fishing craft, both when used and when not used; and to make yearly payment to the owners of the soil for the same; that by this custom, the appellants are obliged to pay tithes in kind for all fish not excepted in the custom which are taken not only in *Mount's-bay*, but also in the adjoining seas, which is unlimited and unconfined, and in consequence thereof they are obliged to land their fish in the said parish, and not elsewhere, to be there sold or tasted, and the tithes to be paid in kind before they can cure or dispose of them, though taken in places ever so remote; which many times, from great distance and stormy weather, is impracticable, and puts them under great difficulties and hazard, either of keeping the fish so long, as to render them unfit for use, or being deprived, by attempting to land them, of the opportunity and advantage of catching those quantities, which they otherwise might take: that if this custom should prevail, it would tend to the ruin of the appellants and their families; and they would be under the necessity of breeding up their children to other business, in order to enable them to get a living; whereby a very valuable nursery for seamen would be destroyed, which has in all times afforded a supply of the ablest men for the publick service, in time of need; and the fishing trade in those parts, so advantageous to the

1729. nation, would be in great danger of being lost. It was therefore hoped, that the decree would be reversed, or at least so altered, as that the appellants might only account for the tenth penny of the profit made of the fish by them taken, first deducting their charges and expences in catching such fish, and in providing boats, nets, and other fishing craft, and for mooring and keeping the same when not used.

To all this it was answered, on the other side, that the custom would be vain and fruitless, if it extended only to such as were owners of any fishing craft with which the fish were taken; because in that case every one might exchange with his neighbour the use of their craft, and none catch a fish in his own craft; that the distance at which fish might be taken and brought to shore fresh and good would sufficiently limit the extent of the custom, as to the fish taken in *Mount's-bay*, and the adjoining seas, but any other limits would wholly frustrate the custom, since it would be impracticable for the rector to discover whether the fish were taken within or beyond such other limits; that no direction was given by the decree as to landing the fish, it only established the custom and directed the appellants to account for the value of the tithes demanded by the respondent, and there was nothing, either in the custom or decree, which obliged the appellants to do any thing impossible or unreasonable. That the tithe of fish being payable only by custom was admitted; but that it could be claimed only as a personal tithe *deductis expensis*, was denied; for where, as in the present case, tithes in kind are due only by the custom, it seems impracticable to deduct the expences; that the statute of *Edw. 6.* which gives remedy for predial and personal tithes enacts expressly, that tithe-fish be paid according to custom; and therefore this is within the reason of predial tithes, where no allowance or deduction is made for the rent of the land, ploughing, sowing, reaping, &c. and the answer in this case is, that no such expences are allowable by the custom.

Decree affirmed,
Lords Journ.
v. 23. p. 490.

After hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decree therein complained of, affirmed.

P. 3 Geo. II. A. D. 1729. In Canc.

Fox and others v. Ayde and others. [2 P. Wms. 520.]

THIS was a bill brought to establish a *modus* in favour of the inhabitants of the parish of *Sturton* in *Nottinghamshire*; the *modus* was in consideration, that after the grafs was cut, the parishioner, at his own costs and charges, did make the tithe-grafs into hay by strewing the grafs upon the ground, (which is called tedding it), and afterwards gathering it into week and wind-rows; therefore the persons that inhabited within this parish (which parish appeared to be the greatest part thereof meadow land) were to pay no tithes for the herbage of dry and unprofitable cattle.

A *modus* that in consideration the parishioners made the tithe-grafs into hay, therefore the parishioners, inhabitants within the parish, were to pay no tithes for the herbage of

dry and unprofitable cattle, and they proved, that the parishioners, time out of mind, had paid no tithe of this herbage; yet the court held it to be a material objection on the *modus*, that foreigners living out of the parish made the tithe-grafs into hay, and yet paid tithe-herbage. Fitzgib. 52. pl. 3. S. C.

But, though it was proved in the cause, that the parishioners had not, time out of mind, paid tithes for the herbage of dry and unprofitable cattle, yet there was no evidence, that this excuse for not paying tithes of herbage was in consideration of the parishioners making tithe-grafs into hay; on the other hand it was proved, that foreigners, those who lived out of the town, made the tithe-grafs into hay, as well as the inhabitants, and yet paid tithe-herbage; also it was proved by the plaintiff, that the grafs was tedded and spread, and not divided into heaps or cocks, until the same was made into hay; and in this parish there was a vicar endowed with the small tithes, the rectory an impropriation, and the vicar had 40 l. *per annum* out of it.

Lord Chancellor. 1st, This may be a good custom or *modus*, to excuse the occupier of the same land wherein the parishioners made grafs into hay from paying tithe of after-herbage; but it can be no good *modus* to excuse the herbage-tithe of other land; for at that rate a man might mow and make into hay a small parcel of ground, containing about a quarter or half an acre of land, and by this means be excused from the tithe-herbage of 100 head of cattle.

The court held it to be a void *modus*, that the making the tithe-grafs into hay, should not only excuse that ground from paying tithes for herbage, but that perhaps

a small quantity of meadow ground, by making the grafs thereof into hay, should excuse the greater part of the ground of that parish from paying tithe-herbage.

2dly, It

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2dly, It seems to me a material objection against the custom, that foreigners living out of the parish, though they have no privilege of being tithe-free as to their herbage, yet have made the tithe-grafs into hay, which looks as if it was the usage of that parish for the parishioners to make their grafs into hay of course.

3dly, It seems material what some of the witnesses have proved, that in this parish the parishioners, when they cut down the grafs, did not divide it into ten parts, until such time as they had made it into hay; for, of consequence, the parson could not have any opportunity of making his tithe-grafs into hay himself.

But, 4thly, It being objected, that the consideration of making the tithe-grafs into hay for the benefit of the rector, could be no consideration as to the vicar, who was entitled to the small tithes of herbage;

A *modus* in relation to the tithes due to the parson, may be a good bar to the payment of a small tithe, due to the vicar, because all the tithes did not at first belong to the parson, during which time he might agree to this *modus*.

Parishioners only bound to cut the grafs, and to lay it into heaps or cocks, but not bound to make it into hay.

Lord Chancellour said, that is nothing (*k*); for originally and of common right the parson was entitled to all the tithes, as well small as great, and the *modus* (supposing it to be a good one) must have been time out of mind, and, consequently, must have begun while the parson was seised of the small as well as of the great tithes, and when afterwards the vicarage was derived out of the parsonage, and the parson by consent of the patron and ordinary endowed the vicar with these small tithes, this shall not prejudice the parishioners, or deprive them of the benefit of enjoying their *modus*, which they before were entitled to.

5thly, It was objected, that the parishioners *de jure*, ought to make the tithe-grafs into hay.

But the Lord Chancellour declared the law to be otherwise, and interrupted the counsel when they began to speak to this, saying, that all the parishioners were bound to do was, to cut down the grafs and divide it into ten parts, after which the parson was to make it into hay; and that this had been so resolved in a *Deven-*

(*k*) In the case of *Wintall v. Child*, a prohibition was prayed to a suit in the spiritual court by the vicar for tithes, upon the suggestion of a *modus* to pay so much yearly to the parson of the parish, in discharge of tithes, which plea had been there disallowed. The whole court agreed, that this *modus* between the plaintiff and the parson, would not discharge him from the payment of tithes as to the vicar, and therefore awarded a consultation. The case in *Kibble* is no more than a declaration by Keeling C. J. that a *modus* paid to the parson is no discharge against the vicar.

shire

shire case (the case of one *Reynolds*, 11 *Jac.* 1.); however, in regard foreigners, having meadow land in this parish, made their tithe-grass into hay as well as the parishioners, and yet paid tithe of the herbage, and by reason of the other objections above-mentioned; it would be too much in a court of equity to establish this *modus*, especially where it was insisted upon (as in this case) that the parishioner making tithe-grass into hay did not only excuse the herbage of that ground from tithe-herbage, but also the tithe-herbage that the parishioners were to pay for any land he depastured within the parish, though it might be a great parcel of pasture land, and though the same might be fed all the year.

Dismiss the bill with costs; but without prejudice as to any litigation, that may be made touching the same at law.

P. 3 Geo. II. A. D. 1729. Scac.

Taylor v. Walker. [Bunb. 267.]

BILL was preferred by the plaintiff, as rector of *Checkley* in the county of *Stafford*, for tithes of five closes, in that parish, in the defendant's possession.

Although upon the trial of an issue directed by a court of equity, the evidence proves a *modus* to extend to more closes than are stated in the pleadings, yet not material.

The defendant by his answer insisted, that there was a *modus* of 3 s. 4 d. in lieu of all tithes, arising on the same closes, and that no tithes in kind were ever paid.

Upon the hearing, the court directed an issue to try the *modus*, and upon the trial it appeared in the evidence, that this *modus* was payable, not only for the five closes, but two closes more, particularly named. Mr. Justice *Probyn*, upon this evidence (at *Stafford*) directed the jury, who accordingly gave a verdict for the plaintiff against the *modus*.

Now, upon the return of the *postea*, it was moved for a new trial; for that this being an issue to inform the conscience of the court, the defendant ought not to be held so strictly, especially since no proof of tithes in kind being paid was given; and therefore though it extended to two closes more, yet it was less than really the prescription was, which he insisted on, and therefore he ought to have had the benefit of the proof, as to five closes only.

For the plaintiff it was insisted, that a *modus* ought to be certain being in bar of common right, and therefore he has failed in the defence he insisted on; and Mr. Justice *Probyn's* opinion, as certified

1729. fied by baron *Hale*, was relied on. But, by the whole court, a new trial was granted; and they said, they could not distinguish this from the case of a prohibition.

Tr. 3 & 4 Geo. II. A. D. 1729. Scac.

Bree v. Drew. [MSS.]

A RECTOR brought his bill for tithe of wood, stating, that the defendant had bought great quantities of young oaks under twenty years growth, and other underwood in his parish, which he tithed in a very irregular manner, *viz.* in rows before it was made into faggots or stacks of equal size or dimensions, pretending that it would be a great expence to him to make it into stacks, and then to tithe it; and that he converted the same into smart hoops, mop-slaves, charcoal, and small coal, without setting it up in stacks. The defendant admitted, that he bought sixteen acres of underwood, and cut it, intending to convert it into hoops, mop-slaves, broom-slaves, charcoal, small coal, faggots, bands, &c. and set out the tithe fairly, and converted the residue to the uses above-mentioned: but, that the plaintiff refused to take away the tithe, insisting, that the defendant should convert his part so set out for tithe, to the same uses to which he had converted the nine parts: that the defendant refused to comply with so unreasonable a request, the charges of such conversion being the full value of his wood; and he insisted, that he was not by law bound to bear that expence.

On reading a decree of this court, 18th November 1672, in *Brabourne v. Eyres* (1), and another decree of this court in *We-*

(1) In *Brabourne v. Eyres*, the defendant stated in his answer, that "as to the tithe of wood since *Michaelmas* 1669, he did then, as he had done in the preceding years, cause the tithe-wood to be made up into faggots, upon the plaintiff's promise to pay the charge for faggotting; but the plaintiff had refused to perform his promise; wherefore he had omitted to faggot any more tithe-wood for the plaintiff; that since the year 1669, he had caused a full tenth part of such wood, as was tithable, to be set out for the plaintiff; but that the plaintiff left the same on the defendant's ground, refusing to take it away because it was not made up into faggots and stack-wood for him, which the defendant contends he is not bound to do." The court, upon reading the depositions in the cause, and after great debate, declared, that the defendant ought to have stacked and faggotted the wood which he set out for the tithes; and that the plaintiff ought to be relieved for his tithes for the years in which the defendant did not set them out. 1 *Wood's Decr.* 126.

Serman v. Jones (m), 13th June 1705, the court dismissed the bill with costs.

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Tr. 3 & 4 Geo. II. A. D. 1730. Scac.

Benson v. Olive. [Bunb. 284.]

BILL by the impropiator of *Bromley St. Leonard's*, in the county of *Middlesex*, for tithe-hay, &c.

Defendant not denying plaintiff's title, as impropiator for tithe-hay, but setting up an exemption, must first prove it.

The defendant, in his answer, does not deny the plaintiff's title, but insists upon an exemption, as being parcel of one of the greater abbies, which came to the crown by statute 31 H. 8. c. 13.

Now, upon hearing the cause, the lord chief baron thought, that where the defendant admits the general right, and insists only upon his exemption, such admission is sufficient to put the defendant upon proving his exemption, and the plaintiff (although a lay impropiator) is under no necessity of proving payment of tithes to him.

2. A decree in 1673, was offered to be produced in evidence, wherein the then impropiator was plaintiff, and *Semain* defendant, and wherein the plaintiff's title was affirmed; but the court would not permit this decree to be read, because the now plaintiff could not shew, that the defendant claimed either the same lands, or under the same title as *Semain*.

Decree refused to be read, because not touching the same lands or title.

3. It was objected for the plaintiff, that the defendant's producing ministers accounts 34 & 35 H. 8. was not sufficient, being subsequent to stat. 31 H. 8. c. 13. but that he ought to shew the surrender, or when it came to the crown; but this objection was over-ruled.

Ministers accounts in 34 & 35 H. 8. permitted to be read.

(m) In this case, which was a bill filed by the vicar, owners, and occupiers of lands, in the parish of *Shinfield*, against the impropiators and their lessee, to establish several customs of siting, the plaintiffs stated (*inter al.*) this custom, *viz.* "that when any coppice-woods or shawes have been sold and made into faggots, hoops, bays, hop-poles, and hurdle-rod, and the tenth hath been duly set out, that then the tenant, occupier, or other person, so cutting and setting out such tithe, hath been paid in money the full tenth part of the charge of making such faggots, &c. by the impropiator or farmer of the said rectory." The lessee, in his answer, said, "he believed all such wood ought to be put into a tithable condition, and that the tenth faggot, bay, hop-pole, and hurdle, ought to be paid; but as for hoops, the same ought not to be made for hoops, but that what are designed for hoops are to be tithed before worked, or, if worked, the workmanship to be paid by the impropiator." The court made no decree as to wood made up fit for market. 1730's Decr. 463.

4. A deed

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Deed 40 years old proves itself, and no proof is required where the party had it, or how he came by it.

4. A deed was produced by the plaintiff, dated 30 *March* 1690, and it was admitted it was old enough to be read without proof; but baron *Carter* objected, that the plaintiff should give some account how ~~he~~ came by it; but the lord chief baron said, he could not see the use of that, and it would be very inconvenient; for then there must have been an interrogatory to prove this matter by depositions; for it could not be inquired into on the order to prove exhibits; and the deed was read at last, but by consent; though the rest of the barons seemed to be of opinion with the lord chief baron (n).

Deed 35 years old, does not prove itself.

5. Another deed in 1694 was offered, but objected to by the defendant, as not being old enough to prove itself; and by the court, this deed was not admitted to be read; for though sometimes thirty-five, or even thirty years, have been thought sufficient, yet not where it is objected to; but the usual rule is forty years (o).

Verdict not proved to be touching the same lands, refused to be read.

6. The plaintiff had brought an action on the statute of 2 & 3 *Edw.* 6. c. 13. and obtained a verdict, which he offered now in evidence; but it was opposed, because this was a matter which happened after issue was joined in this court; and the plaintiff not being able to prove, that that trial was for the same lands, the court refused to admit it.

Note. At last the bill was retained for a year, and the plaintiff to be at liberty to bring his action in the mean time.

M. 4 Geo. II. A. D. 1730. Scac.

Hooper v. Lethbridge and others. [Bunb. 291.]

Bill dismissed for want of parties.

BILL by a lay impropriator for tithes in *Pilton* in the county of *Devon*. Some of the defendants insisted by their answer, that part of the lands, of which tithes were demanded, ought to pay tithes to Mr. *Incedon*, who was entitled to a portion of tithes in *Pilton*. Other defendants insisted, that they were tenants to Mr. *Rolle*, and that king *Henry* the eighth granted to his ancestors their lands and the tithes thereof prior to the grant of the rectory, under which the plaintiff claimed. Neither Mr. *Incedon* nor Mr. *Rolle* being made parties, it was objected, that the plaintiff could not proceed as to these lands respectively; and though Mr. *Incedon* was before the court as plaintiff in the cross-bill, yet that praying an exemption as to other lands, both objections were allowed by the whole court.

(n) But *Qu.* Whether Baron *Carter's* was not the better opinion.

(o) The usual rule is *thirty* years.

M. 4 Geo. II. A. D. 1730. Scac.

Ann. [Bunb. 294.]

A RECTOR agrees with a parishioner for his tithes for a certain sum, payable yearly at *Michaelmas*; the rector dies the beginning of *September*; the agreement determining by the death of the parson, the successor shall be entitled to tithes in kind only from the death, and the executor of the last incumbent to a proportion, according to the agreement, till the time of his testator's death; and this is by an equitable construction.

On rector compound-
ing with pa-
rishioners
for tithes,
and dying
before end
of the year,
how the pro-
portions
shall be be-
tween the
successor and executor of incumbent:

H. 4 Geo. II. A. D. 1730. Scac.

Leigh v. Maudsley. [Bunb. 296.]

A LAY impropriator by his bill sets forth, that in the year 1724 he was seised in fee of all the impropriate tithes in the township of *Westhaughton* in the parish of *Dean* in the county of *Lancaster*.

Upon the hearing, he went no further in his evidence of the title, than that about thirty-four years ago these tithes were reputed to belong to the *Andertons* of *Loxlock*, under whom the plaintiff claimed: it was objected for the defendant, that here was not a sufficient title shewn, since a layman was not capable of tithes in perannuity, but from the crown since 32 H. 8. c. 7. and therefore it was incumbent on the plaintiff to shew how he derived them out of the crown.

By the whole court.—If he had set out in his bill a title under the crown, and derived it down, he must have proved it, as he had set it forth; but since he has not, this proof is sufficient. [Which note, and *quære* former practice.]

The defendant in his answer insisted, that his lands were discharged, as being parcel of the possessions of the abbey of *Cockerfand*, dissolved by stat. 31 H. 8. c. 13. but there having been several instances of the payment of tithes of corn in kind, they further alleged, that since no hay had ever been paid, that as to that species of tithe, they ought in all events to be discharged, as against a lay impropriator.

Held suffi-
cient on a
bill by a lay
impropria-
tor for tithes,
his only
proving the
tithes be-
longed to
the Ander-
tons, under
whom he
claimed;
but where a
general ex-
emption is
insisted on,
a partial one
cannot be
admitted in
proof.

But

1730.

But by the court.—Although a defendant may in equity insist on several defences, which are consistent, yet having undertaken to prove a general exemption, and failing in that, he cannot have the benefit of the other point; so the defendant was decreed to account generally.

P 4 Geo. II. A. D. 1731. Dom. Proc.

Pratt v. Hopkins and others. [3 Br. P. C. 521.]

Lands exempted from tithes, as being part of the demesnes of an ancient monastery, being inclosed by act of parliament, shall not be made liable to tithes by any general words in the act.

THE defendants were proprietors and occupiers of several parcels of land, formerly part of *Glastonbury* common, and commonly called or known by the several names of *Common-moor*, *Black-acre*, and *South-moor*, alias *Alder-moor*, and were inclosed by virtue of an act of parliament made for that purpose in the year 1721.

The plaintiff in the year 1719 obtained a lease from the bishop of *Bath* and *Wells* of the rectory and parsonage of *St. John Baptist*, with the chapel of *St. Benning* in *Glastonbury*, and other chapels therein mentioned, and of all tithes thereto belonging, for three lives; and after the inclosure of the commons, viz. in *Michaelmas* term. 1724, he exhibited his bill in the court of exchequer against the defendants and others, in order to compel them to account with and make him satisfaction for the tithes arising out of the new inclosures, and particularly out of *South-moor*.

The plaintiff being well apprized of the defendants defence with relation to their lands in *South-moor*, viz. that the same were exempt from the payment of tithes, as having been part of the demesnes of the great and antient monastery of *Glastonbury*, did in his bill allege, that *South-moor* was not part of the demesnes of the said monastery; but if it was, and might for that reason have been exempt from tithes before the making the act for inclosing the said commons, yet the same were made liable and subject to the payment of the tithes by the following clause in that act:

“ Provided always, and it is hereby declared and enacted by the authority aforesaid, that nothing herein contained shall extend, or be construed to extend, to prejudice any right or interest which the lord bishop of *Bath* and *Wells*, the impropriator of the rectory or parsonage of *St. John Baptist*, in *Glastonbury* aforesaid, or his lessee, hath, have, or may have to any tithes which shall belong

er may accrue to them or either of them, out of the said new inclosures hereby to be made, and that such impropiator, or his lessee for the time being, shall have and receive all tithes; of what kind soever, of and from the said new inclosures, as he is or shall be by law entitled to have and receive the same, as rector or impropiator of the said parish; notwithstanding any *modus*, or pretence of a *modus* or composition in any other parts of the said parish or any exemption whatsoever.”—“And it is hereby further enacted by the authority aforesaid, that the said Bishop of *Bath and Wells*, the impropiator of the rectory or parsonage of *St. John Baptist in Glastonbury*, for the time being, or his lessee, as the said bishop or lessee shall be respectively possessed or entitled to the tithes of the said new inclosures, shall for a further augmentation and better provision for the curate of the said parish church of *St. John Baptist in Glastonbury*, pay or cause to be paid unto the curate of the said parish and his successors for the time being yearly and every year the full sum of 12l. of lawful *British* money out of the tithes that shall or may arise out of the said new inclosures hereby to be made free from all taxes whatsoever.”

To this bill the defendants put in their answers, and thereby admitted the plaintiff's right to tithes out of all such parts of the new inclosures as lay in *Common-moor* or *Black acre*; but as to such parts of them as were taken out of *South-moor*, they insisted that the same were exempt and free from tithes; the said common called *South-moor*, which had heretofore been of much greater extent than what was intended to be inclosed by the act, having formerly been part of the demesnes of the aforesaid monastery, and no tithes having been paid or answered for any part thereof: and the defendants submitted to the court that the act, as passed, had not given the plaintiff any right to the tithes, to which he was not before entitled by law.

In *Trinity* term 1726, the plaintiff replied to the defendants answers, and soon after came to an agreement with them to accept what was due for tithes arising out of *Common-moor*, and *Black-acre*, together with his costs; which being stated together at 17 l. 9 s. 2 d. were accordingly paid to the plaintiff.

After this, the plaintiff and defendants proceeded to examine their witnesses touching the demand of tithes out of *South-moor*, and the depositions being duly published, the cause came on to be heard before the barons on the 19th of *July* 1728, and was heard in part, and, by consent on both sides, adjourned over to the

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next term ; and, upon a full hearing on the 14th of *November* following, the barons unanimously delivered their opinions, that the defendants had fully proved the exemption insisted on by their answers ; and that the act for inclosing the commons had given the plaintiff no new right to tithes out of the said lands in *South-moor*, and therefore decreed that the plaintiff's bill should be dismissed with costs.

From this decree the plaintiff appealed to the House of Lords, contending, that by the express words of the act the impropiator or his lessee for the time being was to have and receive all tithes of what kind soever arising from the new inclosures notwithstanding any *modus* or composition in any other parts of the parish, or any exemption whatsoever, and that these last words would be of no manner of use, if the inclosures in *South-moor* were to be exempt from the payment of tithes, it being admitted by the respondents answer, that the other two commons ought to pay tithes ; that, according to the act, a certain quantity of the commons, containing ten acres, was to be inclosed, as a better provision for the curate of the parish ; but no distinction was ever made as to *South-moor*, so that the allotment might as well be made of lands in *South-moor* as in either of the other commons : whereas if *South-moor* had been exempt from the payment of tithes, and had not been intended to be subject to tithes after the inclosures were made, the curate's allotment ought to have been confined to the other two commons, which were confessedly subject to the payment of tithes. That the impropiator and his lessee were expressly obliged, as they should respectively be entitled to the tithes of new inclosures, to pay the curate of the parish the yearly sum of 12l. free from all taxes out of the said tithes ; whence it was plain, that the act never intended to make any distinction between the commons, the tithes of all new inclosures being equally made the fund for payment of this 12l. *per ann.* that there was an express saving in the act, that nothing therein contained should extend to prejudice the right and interest of one Mr. *Strode*, in respect of an inclosure of one hundred acres made by him in *South-moor* ; and this saving would have been equally extended to the residue of the moor, unless it had been intended to be subject to the payment of tithes ; that though the proprietors and owners, who had inclosed the commons, had greatly improved their own estates, yet it appeared from the evidence, that the rectory

was

was thereby lessened in value for want of sufficient flocks of sheep to manure the arable grounds; by which means, and by the annual payment of 12 l. to the curate, which the appellant had constantly paid, he must be a considerable loser, if excluded from the tithes of the inclosures in *South-moor*, and therefore it was hoped that the decree would be reversed.

On the other side it was said, that the question concerned only the inclosures of the common called *Scuth-moor*, which by the proofs in the cause appeared to be part of the demesnes of the monastery of *Glastonbury*, and, as such, exempt from payment of tithes: that no tithes had ever been paid for this common, though at different times improvements and inclosures had been made of several parts of it, so that there was no room for the court to doubt, but that, at the time of passing the act, the lands in question were exempted from the payment of tithes; that the first clause insisted on by the appellant, was only a general saving to the bishop and his lessee of their former right to tithes; and as to the latter part of that clause, which the appellant chiefly relied upon, acts of parliament were to have a reasonable construction; and taking the whole clause together, it appeared calculated merely to preserve the impropriator's right, notwithstanding any pretence of a *modus, &c.* in other parts of the parish: and it would be very extraordinary by the general words, or any exemption whatsoever at the end of this clause, to destroy a clear legal exemption, when the whole drift of the clauses was only to preserve such right as the bishop, the impropriator, or his lessee then had; that there could be no reason in this case to take away an exemption in favour of an impropriator, because the act did not intend to diminish the tithes; but, on the contrary, the tithes arising from the improvement of the other commons would greatly increase the yearly value of the impropriation.

After hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decree of dismissal therein complained of affirmed. And it was further ordered, that the appellant should pay to the respondents 30 l. for their costs in respect of the said appeal.

Decree affirmed.
Loid's
Journ.
vol. 23.
p. 559.

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P. 4 Geo. II. A. D. 1731. Scac.

Kennedy, Clerk, v. Goodwin. [Bunb. 301.]

Modus of 4l. 10s. a year, for a farm of 30l. is too rank. 2 Wood's Decr. 305.

RECTOR brings a bill for tithes, in the parish of *South Okenden*, in the county of *Essex*.

The defendant insists upon a *modus* of 4l. 10s. payable yearly, at such a day, for his farm called *Quince Farm*, which was of the yearly value of 30l.

It was objected for the plaintiff, that this *modus* was too rank; and of that opinion was the whole court; and the defendant was decreed to accrompt (*p*).

Tr. 4 & 5 Geo. II. A. D. 1731. Dom. Prot.

Webb v. Giffard. [4 Br. P. C. 212.]

In a suit for tithes of lambs the defendant insists on a *modus* of 3d. for every lamb, payable on St. Mark's day, or so soon after as demanded. This *modus* is not void in law, but the validity of it shall be determined by a jury.

THE plaintiff was rector of the parish of *Stoke* next *Guildford* in the county of *Surry*, and the defendant was a farmer and occupier of lands in the same parish.

In *Michaelmas* term 1729, the plaintiff exhibited a bill in the court of exchequer against the defendant setting forth that he was entitled to all the tithes arising in the parish, or to some recompence or satisfaction in lieu thereof, and that the defendant from the year 1726 to the time of exhibiting the bill had occupied great quantities of pasture land on which he kept great numbers of sheep, from which he had lambs yeaned, the tithes whereof were demanded by the bill. The defendant, by his answer, admitted the plaintiff to be rector, and that the defendant occupied a farm and lands in the parish, consisting of twenty-eight acres of meadow and two hundred and forty acres of arable land, but no pasture ground, except as his arable came round in course of husbandry to be sowed with grass seeds, when sowed with summer corn: He also admitted, that about *Michaelmas* he bought a number of ewes with lamb, and had from them great numbers of lambs, which he sold; but insisted, that the plaintiff was not entitled to tithes in kind of lambs, for that there had been the following ancient usage and custom approved within the parish, *viz.* that every occupier of lands and tenements within the said parish, having a lamb or lambs yeaned within the said parish, ought, and

(*p*) Note, here the defendant himself stated the value of his farm.

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for time out of mind had used, to pay to the rector of the said parish for the time being, or his lessee, for every lamb so yeaned within the said parish, the sum of 3 d. and no more, as a *modus*, and in lieu and full satisfaction of the tithe of every such lamb: and that the same was payable yearly on Saint Mark's day, or so soon after as demanded; and that the same had been accepted by the rector of the said rectory for the time being, in lieu of tithe of lambs.

On the 14th of July 1731 the cause came on to be heard; when it was, among other things, decreed, that it should be referred to a trial at law, to try the *modus* as set forth and insisted on by the defendant in his answer at the then next lent assizes for the county of Surry in a feigned action; and the usual directions were given for that purpose.

This decree was made by two of the barons only; and therefore, in order to have the opinion of the whole court, the plaintiff, by petition, alleged that he conceived himself aggrieved by the said decree; for that, admitting the *modus* to be in fact as insisted on, yet that the same was void in law, and as such ought not to be allowed; and to have a trial of that, which in itself was void in law, would be fruitless and vain; and therefore prayed that the cause might be reheard, as to the demand of the lambs.

This petition was argued before all the barons on the 29th November 1731; and they being of opinion, that the said *modus* for tithe lambs was not a void *modus* in law, refused to grant a rehearing on that point, but left the plaintiff to try the *modus* at law if he thought fit.

The plaintiff declining to go to a trial pursuant to the said order, it was on the 28th November 1732 ordered, that the plaintiff should shew cause at setting down the causes after Michaelmas term, why the *modus*, as insisted on, should not be taken *pro confesso*; and no cause being shewn, the order was on the 9th December following made absolute. And on the 8th of February 1732 it was ordered, adjudged, and decreed, that so much of the plaintiff's bill, as related to his demand of tithe lambs in kind, should be dismissed with costs.

From these decrees the plaintiff appealed to the house of lords, and on his behalf it was contended, that the issue to try the *modus* ought not to have been directed before the objections to the validity and legality of the *modus* were considered by the court, because, if the objections were allowed, there had been no foundation to send such issue to be tried; and on the other hand, if such

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issue were tried, and a verdict obtained, establishing the fact of the *modus*, and afterwards, on hearing the objections, the court should be of opinion, that it was not a good *modus*, the parties would then have been put to great charges and trouble to no purpose. It was however submitted, that after the issue was taken *pro confesso* against the appellant, the objections ought to have prevailed, and the *modus* been set aside; because a custom or usage to pay a sum of money in lieu of tithes must be immemorial; but, if it can be shewn by evidence, or from any thing in the nature of the payment, that it is not ancient and immemorial, then it is not a *modus*, but only a composition, which may bind the parson that makes it, but cannot bind the successor without his consent. It is well known, that in ancient times, and long within the time of legal memory, the price of cattle and other commodities was so much lower than at present, that a lamb, which now may be worth 2s. 6d. 200 years ago would not have been worth more than 6d. or in such proportion. But in the present case, the sum of 3d. insisted on to have been anciently and immemorially paid in lieu of every lamb (which sets the price of every lamb at 2s. 6d.) is so near the value of such tithes, even at this day, that it proved itself to be a modern composition only, and not an ancient, customary, immemorial payment or *modus*; and therefore ought not to bind the appellant, who had a right to his tithes in kind.

On the other side it was argued, that the *modus* being a matter of fact, if in anywise doubtful, was properly triable by a jury, especially as the appellant, at the hearing of the cause, refused to admit the fact of such *modus*; and the court would not bar the appellant of his right to tithes, until the respondent had established the fact of the *modus* he had insisted on in the most solemn manner by a trial at law. As to the objection, that the *modus* upon the state of it was void, and ought not to be allowed; and that therefore the trial of such an issue would be vain and fruitless; the ground of the objection seemed to be, that the *modus* was so great, and so near the value of the tithable matters for which it was paid, that it could not be presumed to be well established as a *modus* or prescriptive payment, but must be a modern composition, considering the decrease of the value of money for two or three centuries past; but this objection arising upon a matter of fact, was very proper to be considered by a jury, who would inquire as to the value of lambs in the place where this controversy arose; and therefore

it was hoped, that the decree and orders would be affirmed, and the appeal dismissed with costs.

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Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decree and orders therein complained of, affirmed.

Decree affirmed.
Lords Journ.
v. 24. p. 542.

M. 5 Geo. II. A. D. 1731. Scac.

Brincklow and others v. Edmunds. [Bunb. 307.]

A BILL was exhibited by the land-holders, &c. to establish several *modus*es in the parish of *Newton Longville* in the county of *Buckingham*.

Modus of tithe milk in kind, being a payment of part for the whole, is bad.

1. That tithe-milk ought to be paid by every tenth evening and morning's meal in kind from *Hoe Monday* to the second day of *November*, to commence upon the evening of *Hoe Monday* (that is the *Monday* fortnight after *Easter-day*) and the morning following, to be taken by the rector, at the place of milking, and no tithe milk to be paid for the residue of the year.

Hoe Monday, the *Monday* fortnight after *Easter* day.

But by the court, this is void upon the face of it, being only payment of part for the whole.

2. The second was a *modus* of a halfpenny for each calf in lieu of calves, payable on *Wednesday* before *Easter*. This was admitted by the defendant, and established.

Modus of an half-penny for each calf, established.

3. The third was a smoke penny, in lieu of fire-wood burnt in their respective houses, which was also admitted and established.

Modus of smoke penny for fire-wood, good.

4. The fourth was a halfpenny, payable on shear day, for the wool of each sheep dying between *Candlemas* and shear day, which was likewise admitted and established.

Modus of a half-penny for the wool of each sheep dying, established.

5. The fifth was 4 d. a month payable on shear day for the tithe of wool of every hundred sheep shorn in the parish, which were brought into it after the second day of *February*, and kept till shearing day, and after that rate for every less number of sheep, and for a less time.

Modus of 4 d. a month for the tithe of wool of sheep shorn in the parish, established.

As to this it was objected for the defendant, that the witnesses differed in their evidence as to the time of payment, one proving it to be payable about *Easter*, the other a few days after shearing day; but, notwithstanding this objection, it was established, the defendant having no proof in the cause.

Though objected to, for want of proof.

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*Modus deci-
mandi of
lambs.*

6. Where the parishioner has ten lambs, the tenth is due to the rector on St. Mark's day; if nine, the rector is to have one, and pay the parishioner a halfpenny; if eight, he is to have one, and pay the parishioner a penny; and when seven lambs, the rector is to have one, and pay the parishioner three-pence halfpenny; but for a less number he is to have no lamb, but is only to have a half-penny paid him for each lamb under seven.

Supra.

This was established, notwithstanding it was objected that by the case of *Reignolds* against *Vincent*, a payment on St. Mark's day was adjudged void. But note, it was proved in this cause, that the parson had a benefit; for when there were ten lambs, after the parishioner had taken two, the rector was to choose his one.

*Modus deci-
mandi of
pigs.*

Of eggs and
chickens.

7. The like *modus*, as to pigs, was established.

8. Three eggs for every cock and drake, payable on *Wednesday* before *Easter*; and for every hen and duck, respectively, three eggs, in lieu of tithe-eggs, and chickens and ducks, hatched in the parish, established all, as above, without trial, the defendant having no proof.

No such
modus for
turkeys.

Not to extend to turkeys, because brought into *England* lately.

M. 5 Geo. II. A. D. 1731. Scac.

Chamberlain v. Spencer and others. [Bunb. 238.]

BILL was preferred for glebe, common, and tithes. The case upon the bill and answer were almost exactly the same as that of *Sweetapple* against the Duke of *Kingston*; and the court was inclined to follow the same rule in this case as in that; but the plaintiff agreed to have his bill dismissed as for the glebe and common.

[*The case of Sweetapple v. the Duke of Kingston, which was in Trinity 1 Geo. 2. was as follows.*]

Court re-
tained a bill
for tithes,
glebe, and
common,
until plain-
tiff had as-
certained his
title at law,
and would
not decree
tithes till
then,
though the
modus set up by defendant seemed void, as being too rank.

A BILL was preferred by the rector of *Fledborough*, in the county of *Nottingham*, 1. For tithes, 2. For glebe, 3. For right of common. 1. To the first, the defendants insisted upon a *modus* of 40l. a year, although the lands now are not above 400l. a year. 2. To the second, that the plaintiff never had any possession, though he produced an antient terrier of 1645 specifying his glebe. 3. And the same answer as to the third; and that both were proper at law.

By

By the court. We will retain the bill until the plaintiff has, by action, ascertained his title at law. Though *note*, he had prayed a commission as to the glebe and common, and though the *modus* seemed void, as being too rank; yet they would not decree the tithes until the other points were settled at law.

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H. 5 Geo. II. A.D. 1731. Scac.

Poor v. Seymour. [Bunb. 313.]

BILL for tithe-herbage for sheep depastured in the parish three or four months after they had been shorn, and then were removed into another parish, and shorn there.

Tithe-herbage shall not be paid for sheep which have been shorn in the parish, and paid tithes of wool

By the court. No tithe-herbage shall be paid for such sheep, because they are *animalia fructuosa* (q).

there, though they are removed before the next shearing time into another parish.

(q) In this case, the bill stated, that the defendant had sold off the farm in question a number of ewes and other sheep, which had been depastured there from the time of shearing for three, four, or five months, and that there ought to have been paid to the plaintiff one farthing a month for the tithe of the pasturage of each sheep, computing the same from shearing time until so sold. The defendant said, that the sheep he had fed on the said farm were only a few for manuring the corn-field lands, which, the country being upland, were wintered at a great expence of hay, the tithes of which he had paid to the plaintiff; that in 1727 and 1728 he sold ninety sheep in each year, and that from shear time to the time of the sale was about three months; that no tithes had been paid for the said sheep for the said time, nor had any ever been demanded; and that a farthing for every sheep is double the value of such tithe, supposing it to be due. The court did not decree any tithe for these sheep.—But, it should seem, that this case cannot be law. If sheep are depastured in the parish for any time after they have been shorn, and then removed into another parish, an agistment tithe is due for them; for the tithe year ends at shearing time; and the tithe of wool, which is then paid, is in satisfaction of the tithes of the past year, not of any that may thereafter accrue. This point was determined in the case of *Dummer v. Wingham*. In that case the court held (*inter al.*) that the year for sheep ends at shearing day; and that for such sheep as were kept after shearing day, and sold away afterwards out of the parish, the parson should have a pasturage tithe. And both of these points were affirmed upon a re-hearing. Note, there the parishioners insisted upon a *modus* for tithe of sheep from *Candlemas* to shearing time, viz. the sheep to be sold at *Candlemas*, and the parson to have the tenth fleece, or the value thereof, for all of them, at shearing time; but for such as are brought in after *Candlemas*, the parson 4 d. *per score per mensem* for every month they are kept there to the shear day following.—Note, the sheep for which the court decreed a pasturage tithe were brought in after *Candlemas*, and sold out after shearing time, but no profit was made of them. A bill of review was brought, and the case long debated, and the chancellor of the exchequer was there, and was against the decree; but the other barons affirmed it, and allowed the demurrer to the bill of review. P. 3 W. & M. Baron Legge's MSS.

H. 5 Geo. II. A. D. 1731. Scac.

Swinfen v. Digby. [Bunb. 314.]

Where land is sown with turnips, after the corn is cleared, and fed with sheep and barren cattle, that tithe shall be paid of such turnips.

IN this cause, the court declared, that where land is sown with turnips after the corn is cleared, and fed with sheep and barren cattle, tithe shall be paid of such turnips; though it was insisted upon for the defendant, that the soil in the county of *Sufford* was dry and sandy, and that this method of husbandry improved the land, so that the plaintiff had *uberiores decimas* of corn, and had received the tithe of lamb and wool of the sheep so fed before. But the court over-ruled this defence, and said it amounted to a *non decimando*, as to turnips.

P. 5 Geo II. A. D. 1731. Scac.

Doyley v. Hornby.

Barren land, what, within the statute of 2 & 3 E. 6.

TO a rector's bill for small tithes the defendant said, that three or four years before, he purchased forty acres of poor, barren land, naturally unfit for meadow, or to bear corn, although after a very great expence he had converted part into meadow, and part to tillage, which before was over-run with furze, broom, heath, briars, &c. and lay waste; and he therefore insisted on the benefit of the statute of 2 & 3 E. 6. of being exempt from tithes for seven years after such barren land shall be improved, there being so little natural fertility in the said land, and the small crops produced thereon being solely owing to the soil, dung, and other manure which he had laid upon the same; that he had been a great loser every year by his improving the said lands, and believed no tithe had ever been set forth by any former occupier, and offered to pay 30 s. a year. Tithes decreed.

M. 6 Geo. II. A. D. 1732. Scac.

Goodwin v. Wortley, et e contra. [Decree-Book, 6th December.]

BILL by the rector of *Tankersley* in *Yorkshire* (*inter al.*) for the tithes of wood-lands, and of a water corn-mill. As to the former it was insisted, that there was a *modus* of 1 s. 8 d. a year, payable at *Easter*, in lieu of the tithes of all wood-lands lying in the manor of *Wortley* in the said parish. And as to the mill, a *modus* of 2 s. payable at *Lammas* was insisted upon in lieu of the tithes in kind of all grain ground thereat. A cross-bill was filed by the defendants to establish the *moduses*; and in that bill they stated the first *modus* to be payable at *Lammas*, not at *Easter*. Issues were directed upon the *moduses*; and upon the trial the jury found a verdict for the plaintiffs on both the issues; but as to the first *modus* they found, that it was payable at *Easter*, and not at *Lammas*, as set forth in the cross-bill; and as to the other *modus*, they found it as laid, but added, “that anciently the said mill had two pair of stones, and no more, and that there hath been added to the said mill one pair of stones, which are carried by the same frame and wheels which carried the former stones; but that the said mill can work only two pair of stones at one time.” The court ordered the original bill to be dismissed with costs both at law and in equity; and established the *modus* for the mill; but dismissed the cross cause without costs as to the other *modus*, on account of the mis-statement of the time when it was payable (r).

A *modus* allowed for a mill which had originally only two pair of stones, though a third pair had been added; the whole being carried by the original frame and wheels, and the mill being incapable of working more than two pair of stones, at one time. The court will not establish a *modus*, where the plaintiff mistakes the day on which it is payable. *See vide infra.*
Anderson v. Davies.

H. 6 Geo. II. A. D. 1732. Scac.

Lady Charlton v. Sir Blunden Charlton. [Bunb. 325.]

LORD chief baron *Reynolds* declared it as his opinion, that there could be no prescription in *non decimando* against a lay rector, any more than against a spiritual rector, and that they were equally entitled to tithes of common right; and that it was sufficient for a lay rector to set forth in the bill, that he was seised of the

There can be no prescription in *non decimando*, against a lay rector, any more than against a spiritual rector.

(r) It appears from a note of Mr. *Cupper's*, in the possession of Sir *J. Mitford*, who obligingly communicated it to me, that the defendant in the original cause had moved to amend his answer, by inserting *Lammas* instead of *Easter*-day, imagining, from the inquiries he had made, that that must be the true day; but the court, upon shewing cause, refused to let him do it.

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impropriate rectory; and if he made out his title to that, it would be sufficient, without putting him to the proof of having received tithes; and to this opinion baron *Comyns* seemed to assent. But *note*, he distinguished between one who set up a title to the rectory, and one who entitled himself only to the tithes, or any species of tithes, within a parish: for in this last case the plaintiff shall be held to strict proof, not only of his title, but also of the prescription of all other tithes he sets up a title to. And in this present case, the plaintiff having set forth a title in *Sir Francis Charlton* (under whom she claimed) to all the tithes in the parish of *Langford* (except such small tithes as the vicar usually received) and not to the rectory; and the defendant denying the plaintiff's title to the tithe-herbage, and the plaintiff not being able to prove any herbage tithe ever paid, though she attempted to prove the unity of possession for above seventy years, the bill was dismissed.

P. 6 Geo. II. A. D. 1732. Scac.

Fax v. Bardwell and others; *et c contra*. [2 Wood's Decr.]

THE plaintiff, as vicar of *Lakenham* in the county of the city of *Norwich*, preferred his bill, claiming all manner of tithes, except the tithes of corn and grain, arising from the lands in the occupation of the defendants.

The defendants in their answer said, that the lands of which the vicar demanded the tithes were parcel of the demesne lands of the manor of *Lakenham*; that the said manor and demesne lands, together with the advowsons and rectories of *Lakenham* and of *Brakendell*, were parcel of the possessions of the priory of *Norwich*, and holden as well by the prior and convent as by their farmers, before and at the time of the dissolution, tithe free; that the prior and convent provided a chaplain to officiate in the said church; that the priory was dissolved in 30 H. 8. and by the statute of 31 H. 8. the lands thereof were vested in the crown; that H. 8. changed the priory and convent into a deanery and chapter, and granted the said manor and demesnes to the dean and chapter; that the dean and chapter in Jan. 33 H. 8. demised the site of the manor, and all the lands thereto belonging, and also certain lands assigned out of the manor of *Eaton*, to the manor of *Lakenham*, and a close in *Ameringbale* belonging to that manor, (except the water-mills in *Lakenham* and *Lakenham Wood*), to *R. Flint* for 99 years; that they afterwards demised the wood to him; and declared that it was the

meaning

meaning of the lease, that he should hold the demesnes discharged of the payment of tithes; that the dean and chapter surrendered the manor and demesnes and advowson of the church of *Lakenham* to *Edward* the sixth in the first year of his reign; who refounded them, and granted to them the rectories of *Lakenham* and *Brakendell*, with a reservation of the demesnes of the manor; that *Edw. 6.* granted the said manor and demesnes to *T. Gresham* and his heirs, to hold them as the prior had holden the same; that the lands in the possession of the defendants were parcel of the demesnes, and were then become vested in earl *Berkeley*; and have ever since been holden by the occupiers thereof discharged of the payment of tithes. They further stated, that the said dean and chapter, from their first foundation by king *Henry* the eighth until the year 1610, had constantly found a chaplain to officiate in the said parish as the late prior and convent had done, and had taken all tithes arising therein, except what belonged to the said manor and lands; that the said prior and convent, in all their leases of the said rectory before the dissolution, and the said dean and chapter until the year 1610, and a long while after, expressly demised "all tithes of corn, hay, hemp, and flax, in the said parish," and all other tithes there, but always expressly excepted "all tithes belonging to the said manor of *Lakenham*."

The plaintiff set forth, by his amended bill, that the vicarage of *Lakenham* is a very ancient vicarage; that there was a regular succession of vicars for many years before and until the year 1386; that there had been such regular succession ever since the year 1610; that although the prior and convent of *Norwich*, and the dean and chapter there were patrons of it, and ordinaries of the place, and also owners of the manor of *Lakenham*, and appropriators of the said parish, and did, for several years, suffer the same to lie vacant, and during such vacancy did let the vicarial tithes arising on the demesnes of the said manor, yet that they never demised the same while there was a vicarage regularly instituted, and particularly since the year 1610; and that their tenants had submitted to pay the vicarial tithes for the said year, and during the said leases, or had made some composition for the same; that *T. Ward*, formerly occupier of the demesne lands, refusing to pay tithes to *F. Folchier* clerk, his, the plaintiff's, predecessor, the said *F. Folchier* filed a bill against the said *T. Ward*, demanding the said tithes,

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tithes, and obtained a decree for an account (1); that *J. Sherwood*, then tenant of the said vicarage under *P. Burrough* clerk, vicar there, filed his bill also against *T. Ward* the son; and the court decreed an account for tithes (1); that the defendant *Bardwell*, husband became occupier of the said demesne lands in the year 1721, and readily paid the plaintiff all tithes thereon, except the tithes of corn and grain, until his death in the year 1727. The vicar therefore prayed the benefit of the former decrees.

The defendants, in their answer to the vicar's amended bill, insisted, that all the lands in *Lakenham* and the tithable places

(1) This decree, in the case of *Folchier v. Ward*, is dated the 10th May 1699, in Easter term, 11 W. 3. The bill stated, that the plaintiff had been instituted vicar of *Lakenham* in the month of December 1692, and that he was thereby entitled to and demanded the tithes of hay, and all other tithes, excepting of corn and grain, which he admitted belonged to the impropriator, arising on the estate called *Lakenham Hall*, from the time of his institution. The defendant said, that the lands belonging to the said estate were the demesnes of the manor of *Lakenham*; that no tithes had ever been paid or demanded for the same; that he had heard that the said lands were formerly parcels of the possessions of some priory or religious house in *Norwich*, and came, by the dissolution of monasteries, to the crown; that *Edw. 6.* granted the manor, rectory, and church of *Lakenham*, and the advowson, patronage, and vicarage of *Lakenham*, and several other messuages and lands in *Lakenham*, to *Thomas Gresham*; and that thereby, or by some more ancient composition, the said lands were discharged from the payment of tithes.—The court, on reading the depositions and several ancient records, ordered the defendant to account for the tithes demanded by the bill, with costs. The defendant, hearing this opinion, proposed to pay the vicar 8 l. a year for the tithes of *Lakenham Hall*; to which the vicar assented, and the agreement was confirmed by *Mr. Chapin*, the owner of the estate, and made an order of the court by the consent of all the parties.

(2) This decree is dated the 24th February 1723, Hilary term, 10 Geo. 2. The bill stated, that *P. Burrough* had been instituted into the vicarage of *Lakenham* in the year 1715; and by lease, dated the 20th of February 1715, had demised to the plaintiff the tithes thereof; and he demanded of the defendant, an infant, as administrator to his father, the tithes, except of corn and grain, of *Lakenham Hall*. The defendant appeared by his guardian; and insisted, that the lands thereof were parcel of the manor of *Lakenham*, and formerly the possessions of the cathedral church of *Norwich*, or some other religious house; that on the dissolution thereof, the manor, farm, and rectory, came to the crown; and thereby, or otherwise, were exempted from, or the owners entitled to, the payment of the tithes thereof; that *Edw. 6.* granted the manor, the rectory, and the advowson and patronage of the vicarage of *Lakenham*, to *Thomas Gresham*, and his heirs, &c.—The court, on reading a copy of the grant from *Edw. 6.* to *Gresham*, dated the 1st of July, in the seventh year of his reign; the proofs in the cause of *Folchier v. Ward*; and an enrolment of the charter of *Edw. 6.* granted in the first year of his reign to the dean and chapter of *Norwich*, ordered the defendant to account for the tithes demanded by the bill; and on the 15th of April 1725, the report thereon was confirmed.

for which the vicar demanded tithes, were parcel of the demefne lands of the manor of *Lakenham*; that the other lands in their occupation were parcel of the feveral manors of *Eaton* and *Ameringhale*; that the faid manors of *Eaton* and *Ameringhale*, and the demefne lands thereof, and the feveral churches of *Lakenham*, *Eaton*, and *Ameringhale*, and the rectories there and of *Brakendell*, are adjacent; that they had been part of the poffeffions of the diffolved priory and convent of *Norwich*, even from the foundation, and long before the reign of *Richard the fecond*; that the faid manor, and the demefne lands thereof, were before that time, and had been ever fince, held tithe free; that in the year 1094, *Herbert*, bifhop of *Norwich*, founded the church, and in the year 1101 conftituted monks there, and granted them the holidays which king *William Rufus* had given to them; the feaft of *Pentecoft*; the tithe of the faid bifhop's manor and *Lakenham*, together with all things to the faid village belonging, befides *Ameringhale*; all which the faid *Herbert*, bifhop of *Norwich*, gave to God and the church for food and raiment of the monks; and all which were held tithe free; that between the years 1312 and 1386, feveral perfons were inftituted vicars, at pleafure, of the faid church of *Lakenham*, on the prefentation of the faid prior and convent; that the prior of *Norwich* obtained a grant or licence from *John de Grey*, bifhop of that fee, fome time after the twelfth century, by which it appeared, that the faid bifhop granted to the monks of *Norwich* the feveral churches aforefaid, to be poffeffed to their proper ufes, faving to the faid bifhop and his fucceffors the pontifical and parochial rights; and in particular gave licence to the faid monks, that when it fhould happen that the faid church of *Lakenham* fhould be void, they might enter upon the faid void poffeffion, and ferve it by their chaplain at pleafure; fo that after the feveral ftatutes of *Richard the fecond* for the endowing of vicarages, and that of king *Henry the fourth*, which prohibits all appropriations of vicarages, or any religious perfon to be vicar, the faid prior and convent never after prefented to the faid church; nor the faid dean and chapter until the year 1625; that from the year 1386 till the year 1610, being two hundred and twenty-four years, there was not any vicar inftituted and indufled therein; but that during that time it was ferved by their chaplains removable at pleafure; that the faid vicars had not any portion of tithes affigned to them, or received any out of the rectory or any part of the demefne lands of *Lakenham*, they being always held tithe

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free; that such vicars were only curates or stipendiary chaplains, totally exempted as well from the vicar as the said dean and chapter, as rectories impropriate, by the laws aforesaid; and that the whole tithes became incorporated in the inheritance of the land, and therewith did well vest in the crown by virtue of the 31 H. 8. and from the said king in the said dean and chapter, and so passed from them into the hands of *Edward* the sixth by the surrender aforesaid, and were granted to *Gresham* in the same manner. But they admitted, that the defendant *Bardwell*'s husband might, for peace's sake, have paid his tithes to the plaintiff, as in the said amended bill is mentioned.

Lord *Berkeley* and others, together with the said defendants, filed their cross-bill against the plaintiff *Fox* and the dean and chapter of *Norwich*, insisting on the matters and things set forth in the said defendant's answer to the original bill; and they set forth their titles to the demesne lands, &c. in the said parish of *Lakenham*; and prayed a full discovery of the matters in question, and that the defendant *Fox* might account for what he had received, and that the said exemption lord *Berkeley* claimed might be established.

The vicar, by his answer to the cross-bill, said, that the vicarage of *Lakenham* was an anciently endowed and perpetual vicarage; and set forth the matters to the same effect as in his original amended bill; and also the contents of bishop *Herbert*'s charter or grant to the monks of the cathedral church of *Norwich*. He also stated, that some of the vicars might, for peace's sake, have accepted of some compositions for the vicarial tithes of *Lakenham Hall Farm*; that 50 l. a-year had, for time immemorial, been constantly paid to the vicars there for the tithes of *Lakenham Water Mills* and meadows, without dispute; and that the plaintiff *Lackford*, the present occupier of the mills, tenement, and meadow, had always peaceably paid him the same as a composition for the tithes of the said mills.

The dean and chapter of *Norwich* answered and set forth, that the said vicarage of *Lakenham* was, they believed, an anciently endowed and perpetual vicarage; that a succession of vicars were instituted therein in the fourteenth century; that though the said vicarage might lie vacant for several years, yet they found, by divers ancient records belonging to their church, that the said vicarage was and continued subsisting and lawfully void; and that the same perpetual vicarage had been again filled up for many years, first by the crown, on account of lapse, and ever since by the

the presentation of the said dean and chapter; and they set forth the several grants and leases as before stated; and said, that they believed that they had been at one time deprived of their rights and possessions, but were restored to them on the restoration of *Charles the second*, with the like charge upon lord *Berkeley* of 10 l. *per annum* for the tithes of the demesne lands of the said manor; by which means the owners thereof had ever since enjoyed the tithe of corn.

In both causes the plaintiffs replied, and the defendants rejoined, and witnesses were examined on both sides; and upon hearing counsel for all parties, and on reading the answers (u), the court ordered the defendants to the original bill to account with the plaintiff for all the tithes demanded by the said bill arising, happening, and renewing on the lands in their respective occupations in the said parish of *Lakenham*, and for the values of the tithes of all such tithable matters and dues for and during the time charged or required in or by the said bill; and that the cross-bill be dismissed with costs.

The plaintiffs, in *Hilary* term, in the seventh year of *George* the second 1734, petitioned the court for a re-hearing; but the court thought proper to refuse a re-hearing, because application was not made for that purpose within six months after pronouncing the decree, although the decree was not then passed.

On the 18th of *March* 1735, the defendants appealed to the house of lords, insisting, that though vicars might have been anciently instituted in the church of *Lakenham*, yet no vicarage being endowed, they were not entitled to any tithes, for tithes are not due of common right to a vicar; and in the present case, there was not the least evidence of any endowment, neither was there any proof of the payment of tithes by the occupiers of the demesne lands, till *Ward* was forced to it by *Folchier* by a decree made upon a mistaken and improper defence, and in a suit to which the owners of the inheritance were not parties, and who should not therefore be bound by any decree; that the title of the appellants to the exemption insisted on depending upon old records and other written evidence, and also upon a great variety of facts, which they were ready to make out, and strongly insisted to try by a proper issue

4 Br. P. C.
221.

(v) Note, none of the depositions were read, as appears as well from the Decree-book, as from the appellant's case.

1732. at law, the right was now, in effect, determined against them, without a hearing.

On the other side it was argued, that as the vicarage still subsisted, the abuse practised by the prior and convent in keeping it vacant by not presenting could not prejudice the rights of the vicarage, when the same became full; that the surrender of the dean and chapter to king *Edward* the sixth, though it might have vested in the crown the manor and demesne lands and the tithes of corn, to which the dean and chapter were entitled, as impropriators, yet it could not affect the rights belonging to the vicarage; that the general right being with the respondents, it was incumbent on the appellants, at the hearing of the causes, to have proceeded and laid before the court the evidence of their pretended exemption, which, in all probability, they would have done, had they thought the same sufficient, or in any degree stronger than the evidence in the two former causes, wherein decrees had been pronounced in favour of the vicar and his lessee; but, as the appellants did not offer any evidence to this purpose, it was agreeable to the constant and known practice of the court to decree according to the general right wherever persons claiming an exemption give no evidence in support of it; and therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with exemplary costs.

Decree reversed,
Lords Jour.
vol. 24.
P. 545.

But after hearing counsel on this appeal, it was ordered and adjudged, that the decree and order of dismissal therein complained of, should be reversed; and it was further ordered, that the said court of exchequer should proceed to hear the causes upon the pleadings and proofs taken therein.

In pursuance of this order these causes were on 6th *November* 1735 heard upon the pleadings and proofs, and upon that occasion, the following argument was delivered, as it should seem, by Mr. Baron *Comyns*:

Mr. Baron
Comyns's
argument.
Com. Rep.
498.

This was a bill by *Fox*, as vicar of *Lakenham*, for the tithe of hay, and all vicarial tithes arising on lands in the possession of the defendants from the 10th of *October* in the year 1727 for the year following. And the case, upon the depositions, appeared to be this: In the time of *Will. 2.* the cathedral church of *Norwich* is supposed to be built; and the bishop's see removed from *Thetford* thither.

In

In the time of *Hen. 1.* Herbert bishop of *Norwich* grants to the prior and convent of *Norwich*, "*Ferias quas Rex Willielmus fratribus donavit, in hebdomadâ Pentecostis, &c. Lakenham, cum omnibus rebus quæ ad eandem pertinent villam, præter terram Osberti archidiaconi Ameringhale, medietatem silvæ de Thorp, &c.*" But this seems rather a confirmation of the grant of *Hen. 1.*

A. D. 1121, Edward bishop of *Norwich* confirms to them, "*Omnia quæ prædecessores mei dederunt, & similiter quicquid Herbert de Rofs habuit in Lakenham, &c.*"

A. D. 1646, William bishop of *Norwich* confirms to them, "*Omnia quæ Herbertus episcopus Norwicensis, aut Everardus episcopus Norwicensis, donavit, & quicquid Herbert de Rofs habuit in Lakenham, &c.*"

A. D. 1200, John de Grey, bishop of *Norwich*, grants to the prior and convent of *Norwich*, "*Ecclesiam de Lakenham, cum omnibus ad eandem pertinentibus, &c. administrari per capellanos suos, salvo nobis & successoribus nostris jure pontificali & parochiali.*"

16 *Hen. 3.* *A. D. 1232*, an *inspeximus* and confirmation of the grants of king *Will. 2.* and *Hen. 1.* wherein they grant "*manerium de Lakenham, Ameringhale, medietatem silvæ de Thorp, &c.*"

A. D. 1273, there was a confirmation by pope Gregory to the monks of *Norwich* of a grant of the church of *Lakenham*; and by the valuation of ecclesiastical benefices 20 *Ed. 1.* and 26 *Hen. 8.* it appears, that the cure was served by the monks, who received an annual pension.

By charter 30 *Hen. 8.* the king "*Cænsium de priore et conventu ecclesiæ cathedralis Sanctæ Trinitatis Norvici transposuit & mutavit in decan. & capitulum ecclesiæ cathedralis Sanctæ Trinitatis Norvici;*" and incorporated the dean and chapter, and granted them all the possessions of the priory. See 3 *Co. 73.*

The dean and chapter having by this grant the manor of *Lakenham* and likewise the church of *Lakenham*, as being part of the possession of the prior and convent, by lease dated the 2d *Jan. 33 Hen. 8.* *A. D. 1541* demised to Robert Flint the site of the manor of *Lakenham* and all the lands belonging, except the mills and woods, for ninety-nine years, and covenanted, that the lessee should have the tithes of his cattle going on the said demesnes; and that the dean and chapter would discharge him of all tenths, &c.

On the 1st of *March, 1 Ed. 6.* by indenture, the dean and chapter, in consideration that Robert Flint had been at great charge in building and repairing the houses, demised to him *Lakenham* woods;

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and it is declared; that whereas he held the manor of *Lakenham*, (that is to say, the site of the manor and demesne lands by the lease made in 33 *H. 8.*) which it is said had been always freed from the payment of tithes predial and personal in the hand of the farmers; the meaning was, that he should hold the said manor of *Lakenham* discharged of all manner of such tithes; and by the same indenture, the dean and chapter demised to him the tithes of hay and corn growing on the said demesnes for ninety years.

On the 3d of *June 1 Ed. 6.* the dean and chapter surrendered their possessions to the king, who, by letters patent dated the 9th *Nov. 6 Ed. 6.* grant to the dean and chapter, "*Omnia illa maneria nostra de Hindlenoston, &c. viginti maneria in com. Norf. ac etiam omnes illas rectorias & ecclesias nostras de Hindlenoston, &c. Lakenham, &c. viginti quinque rectorias in com. Norf. &c. ac etiam advocaciones, donationes, jura patronatus vicariarum prædictarum ecclesiarum, & earum cujuslibet; necnon omnia & singula maneria, messuagia, &c. reddit. &c. glebas, decimas, oblationes, obventiones, pensiones, portiones, advocaciones, jura patronatus, proficua, & hæreditamenta nostra quæcunque, in villis, &c. de Hindlenoston, Newton, &c. Lakenham, &c. in com. Norf. &c. ad dictam ecclesiam cathedralem dudum spectant. Except' tamen, & nobis, hæreditibus, & successoribus nostris reservat' maner' de Hemilby ac rectoria & advocacione vicariæ de Wykelwood in com. Norf. necnon omnibus & singulis messuagiis, terris, decimis, redditibus, & hæreditamentis, in Hemingsby, Lakenham, &c. aut alibi, dict' maner' de Hemilby, Lakenham, &c. ac rector. de Hemilby, seu eorum alicui, quoquomodo spectant. ac except. omnibus terris, &c. decimis jacentibus in Eaton, ac assignat' maner' de Lakenham extra dict' maner' de Eaton, ac extra dict' maner' de Ameringhale, ac modo in tenur' Roberti Flint.*"

By patent, dated the 1st of *July 7 Ed. 6.* the king grants to *Thomas Graham*, esq. "*Manerium de Lakenham, ac tot' rector' & ecclesiam de Lakenham, ac advocacionem & jus patronatus vicariæ ecclesiæ ibi, &c. ac omnia & singula messuagia, grangias, &c. glebas, &c. & decimas garbar. blador. granor, fœni, et cannabi, ac al' decimas quasunque in Westacre, Lakenham, &c. dict' maner' ecclesiæ, &c. seu eorum alicui spectant, &c.*"

It does not appear that any vicar was instituted till the year 1610, but that since then *Smith* and others have been instituted vicars, and *Sir Nevil Catlin*, his father and grandfather, held *Lakenham* farm, as assignees of the lease made to ———; that

Tuck, Wright, Ward, Armiger, and Revier, were tenants under the *Callins*, of the said farm; that the common reputation has been, that the vicars of *Lakenham* have been entitled to all the tithes of *Lakenham*, except the tithes of corn. 1732.

That tithes have been paid by the owners and occupiers of this farm to the vicars, or a composition for them, which was usually 8*l.* a year; that *Richard Catlin*, father of *Sir Nevil*, paid so in lieu of vicarial tithes to *Smith* the vicar; that *Tuck's* father held the farm several years and paid so; that *Wright* for many years did the same; that *Ward* refused to pay, on which *Smith's* widow sued him in the exchequer, and had a decree 9 *W. 3.* to pay tithes in kind, and being informed *Richard Catlin* had paid 40*s.* quarterly, on the recommendation of the court, the plaintiff accepted 8*l.* a-year, and *Ward* paid it for time past, and for all the time afterwards which he held the said farm.

That *Wright, Richard Catlin*, and his father, paid so; that *Tuck* and his father paid so; that *Armiger* and *Mercer* paid so six or seven years; that his father at first paid but 5*l.* or 6*l.* a year, for two or three years, but hearing 8*l.* yearly had been paid, agreed to pay so; but paid only 5*l.* a year to *Harwood*, who was an easy man; and payments by *Tuck, Wright*, and *Ward* were confirmed. Books of *Richard Catlin* contain entries of his payments *anno* 1632 and 1635.

And two decrees for payment 9 *W. 3.* and *Trin. 8 Geo. 1.* were read, the last of which was against *Bardwell*, now defendant, and *Ward* his tenant; and *Rebecca Ward* his wife said, that her husband paid 20*l.* for the tithes of the year 1720, and 22*l.* for tithes of the year 1721; and by a report in the last cause, on the 15th *April* 1725 the defendant was reported indebted 20*l.* for the tithes of the year —; and decreed to pay that sum and costs.

On the defendant's part they produced, beside the charters and grants above, a lease dated the 14th *October* 34 *Hen. 8.* from the dean and chapter of *Norwich* to *Lawrence Stiflead* for fifty years of the tithes of all corn belonging to the parsonage there, except the tithes of corn, hay, tack, and hemp, belonging to the manor of *Lakenham*, wherein is recited a lease from the prior and convent of *Norwich* for twenty years to *Robert Piſſoe* dated the 10th of *November* 27 *H. 8.*

This lease to *Stiflead* was assigned to *Thomas Piſſoe*, and on his surrender by indenture dated the 12th of *April* 1 *Eliz.* the dean and chapter demised to *Piſſoe* the tithes of corn in *Lakenham* be-

1732. long to the parsonage there (except as before) for eighty years from *Michaelmas* then last.

On surrender of this lease by indenture dated the 20th of *December* 8 *Eliz.* the dean and chapter demised the same to *Edmund Dean*, who was assignee of — *Scrivens*, assignee of *Thomas Pieloe*, for seventy-three years.

By indenture dated the 14th of *February* 12 *Eliz.* the dean and chapter on surrender of the last lease demised to *Lane* for seventy years.

It appears that *Lakenham* farm is part of the demesnes of the manor of *Lakenham*, and consists of thirty acres in *Lakenham*, twenty-eight acres in *Ameringhale*, the town-close which lies in *Eaton*, and the rest consisting of — acres, which lies in *St. Stephen's* parish; and it was proved by ten witnesses, and several depositions in the former causes, that *Lakenham* farm was reputed tithe free, and that no tithes in kind either great or small were ever paid for it; and *Wright* and *Ward* said, that what they paid was only a free gift.

On this case it was insisted for the defendants, that *Lakenham* farm was excepted from payment of tithes by the statute 31 *H. 8.* or secondly by the grant 7 *Edw. 6.* or, at least, the plaintiff cannot be entitled to recover any tithes, as having no vicarage endowed.

1. It was argued, that the manor of *Lakenham*, and likewise the rectory, having been granted to the prior and convent of *Norwich*, there was a unity of possession, which was a foundation for an exemption by statute 31 *H. 8.* But this was not so much insisted on; for although it was agreed, that where a perpetual unity continued to the time of the dissolution, by force of the statute it was a good ground for exemption of those lands for tithes in the hands of the patentees; yet here was no proof, that the priory of *Norwich* was one of the greater houses that came to the crown 31 *H. 8.* and it is evident that it was in the crown before, and, consequently, by surrender, or by the statute of 27 *H. 8.* for by letters patent 2d *May* 30 *H. 8.* the king changes the prior and convent of *Norwich* into a dean and chapter, and transfers to the dean and chapter of *Norwich* all the possessions of the priory.

Now no lands belonging to religious houses that were dissolved by 27 *H. 8.* were exempt from tithes; and unity of possession was not in itself any discharge; for the tithes being collateral to the land, as soon as the unity ceased, the right to tithes revived accordingly.

ingly. It appears that the dean and chapter of *Norwich* having the possession of the priory, immediately made leases of the tithes. By indenture dated the 2d of *January* 33 *H. 8.* they demised the manor of *Lakenham* to *Flint*, who in consequence was bound to pay tithes to the rector, the lessor, and on the 14th of *October* 34 *H. 8.* they demised all the tithes of corn belonging to the rectory to *Law. Stisted* for forty years, to commence after a prior lease of them by the prior and convent dated the 10th of *November* 27 *H. 8.* to *Rob. Picote* for twenty years; so it is plain they did not then look on the tithes to be extinct, or the manor of *Lakenham* to be exempt from the payment of them.

It is true, in the lease to *Flint*, the dean and chapter covenant he should not pay tithes for his cattle agisted on the demesnes of the manor, which covenant shews, that without it tithes might have been demanded for the agistment of his cattle. In the lease to him dated the 1st of *March* 1 *Edw. 6.* it is declared indeed, that the manor of *Lakenham* had been always freed from tithes predial and personal in the hands of the farmers, and on that account it was explained that he should not be charged for any such tithes, and the predial tithes of the demesnes are demised to him for ninety-nine years.

But, though this be insisted on as an argument, that the demesnes were always discharged of tithes; yet, if a construction be made according to the import of the words, it seems rather to infer the contrary. It is very likely that the prior and convent, when they leased out any part of their lands, leased them free from the payment of tithes, in order to gain the higher rent; and therefore in the lease of the manor of *Lakenham*, or any part of the demesnes, they exempted them from paying any predial or personal tithes. But this was an exemption that was not inherent in the lands, but was the effect of their covenant to excuse them; when, therefore, the covenant in the lease 33 *H. 8.* excused only the tithes of the cattle agisted on the demesnes of the manor, that was not equivalent to what the former tenants were excused from; and therefore in the lease 1 *Edw. 6.* it was declared, that the meaning was to excuse him from all predial and personal tithes, but not from all tithes whatsoever; and therefore the predial tithes only were demised to *Flint* for ninety-nine years; but all mixed tithes, with which the vicar is usually endowed, were still payable by him; the covenant to discharge all tithes, was meant only to exempt them

1732. from the tenths payable by statute 26 H. 8. and not to excise from any other tithes.

2. But the thing mainly insisted on is, that by letters patent dated the 7th of *Edw. 6.* the king granted to *Thomas Gresbam* the manor of *Lakenham*, *Ac totam rectoriam & ecclesiam de Lakenham, ac advocationem & jus patronatus vicariæ ecclesiæ ibidem, ac omnia messuagia, &c. glebas, decimas, in Westacre, Lakenham, &c. dict' maner' ecclesiæ, &c. seu alicui spectan. &c.* Whence it is inferred, that the plaintiff, collated to the vicarage by the dean and chapter, can 'have no right to the tithes, at least, not to the tithes arising from the manor of *Lakenham*.

And although it was answered, that by the letters patent 1 *Edw. 6.* the king had granted the rectory of *Lakenham* and advowson of the vicarage to the dean and chapter, and, consequently, the subsequent grant to *Thomas Gresbam* is void; yet it was urged, that in that grant there is an exception of all tithes in *Lakenham* to the manor of *Lakenham* belonging; as therefore the demesnes of *Lakenham* have always been reputed exempt from tithes, and they came to the crown tithe free, and those tithes by this charter are granted to *Thomas Gresbam*, the plaintiff cannot be entitled to them.

But it is evident by what is before said, that the manor of *Lakenham* and other possessions of the prior and convent of *Norwich* came not to the crown by the statute 31 H. 8. but were in the crown before, either by surrender of the prior and convent, or by the statute 27 H. 8. and, consequently, did not come to the crown tithe-free; but in reality, although the manor of *Lakenham* and the rectory of *Lakenham* had been long united, upon the severance of them the right of tithes revived. When therefore king *Edw. 6.* in the first year of his reign granted to the dean and chapter of *Norwich* the rectory of *Lakenham*, all the tithes in the parish of *Lakenham* became due to the dean and chapter, as well those arising out of the demesnes of the manor, as elsewhere; and the exemption does not extend to any tithes, parcel of that rectory. But first, the king having granted several manors, rectories, and all other hereditaments in *Lakenham*, or elsewhere in the county of *Norfolk*, which heretofore belonged to the cathedral church of *Norwich*, he excepts out of this grant the manor of *Lakenham*. But this amounted not to an exception of the rectory (if it had been appendant to the manor, as it was not) because the rectory was expressly granted away before. Then he excepts all tithes

to the manors of *Hemilby*, *Lakenham*, and rectory of *Hemilby*, *aut
orum alicui spectant*; but this doth not except the tithes of the
demesnes of *Lakenham*, which were not belonging to the manor,
but to the rectory of *Lakenham*; for the tithes are collateral to
the land. Besides, it does not import any tithes belonging to
the manor, for it comes in with general words belonging to the
manor or rectory of *Hemilby*, or any of them, so that it excepts
not any tithes belonging to the manor, unless it otherwise appear
there were any such. The next branch of the exception, indeed,
seems to import, that there were tithes belonging to the manor,
since it excepts all tithes in *Eaton*, assigned to the manor of *La-
kenham* out of the manor of *Eaton*, and out of the manor of *Ame-
ringhale*, now in the tenure of *Robert Flint*; and it seems pro-
bable that there might be some portion of tithes granted before the
council of *Lateran* out of *Eaton* and *Ameringhale*, and annexed
to the manor of *Lakenham*, because in the lease of *Stifthead* 34 H. 8.
of the tithe corn belonging to the parsonage of *Lakenham*, there is
an exception of the tithe of corn, hay, tack, and hemp, belonging
to the manor of *Lakenham*, which were probably excepted out of
Stifthead's lease, because they were before demised to *Flint*; and
perhaps by the lease of the site of the manor of *Lakenham* 33 H. 8.
and 1 Edw. 6. and the demesne lands, they might be thought to
be comprehended in the general words; but whether they were
in the tenure of *Flint* by those leases, or any other, the exception
of the tithes being in *Eaton*, & *assignat* & *appunctuat* manerio de
Lakenham, *extra maner* de *Eaton*, & *maner* de *Ameringhale*,
cannot except the tithes arising out of the demesnes of *Lakenham*
and belonging to the rectory of *Lakenham*.

And if those tithes be not excepted out of the grant 1 Edw. 6.
they could not pass to *Thomas Gresham* by the grant 7 Edw. 6.
They could not pass as a part of the rectory, being granted
1 Edw. 6. to the dean and chapter; neither could they pass by the
grant 7 Edw. 6. for the king was deceived, and his grant to *Thomas
Gresham*, as to the rectory of *Lakenham* and the advowson of the
vicarage and the tithes belonging to the church of *Lakenham*,
was void; it may possibly stand good, as to any tithes in *Eaton*, or
assigned out of the manor of *Eaton* or *Ameringhale* to that of
Lakenham.

I need not cite cases, to shew, that an exception doth not extend
to exclude out of a grant what is expressly granted, 2 Rol. Abr.
454. f. 8. A man is seised of the manors of C. and D. *Blackacre*

1732. is part of the manor of *C.* but lies near *D.* and is enjoyed with and reputed parcel of *D.* he grants the manor of *C.* and all lands reputed parcel of it, except the manor of *C.* *Blackacre* is not excepted, being expressly granted as parcel of the manor of *D.* under the words *all lands reputed parcel of that manor.*

Suppose king *Edw. 6.* had granted to *Thomas Gresham* the manor of *Lakenham*, the rectory of *W.* and all the lands, tithes, &c. to the said manor and church or either of them belonging, and afterwards had granted the rectory of *Lakenham*, *cum omnibus juribus, membris, & pertin' dict' ecclesiæ Cath' dudum spectan'.* I apprehend that the tithes of the demesnes of the manor belonging to the rectory would not have passed to *Gresham.* It would be like the case *Mo. 426.* where the abbot of *Abingdon* seized of the hundred of *H.* and the leet belonging and other lands which came to the crown on the dissolution, the king grants to one *Lions* part of those lands, and all leets *infra præmissa*, and after grants the hundred of *H.* and leet belonging to lord *Norris*; it was holden, that the leet passed by the last, not by the first grant.

Thirdly, But in the last place it is said, that here was never any vicarage endowed, for the cure was supplied by the monks, who had a salary allowed them, and, consequently, the plaintiff cannot recover, for the vicar cannot be entitled to tithes, unless endowed of them, and the endowment must be proved by an endowment produced, or by prescription; but here is not any endowment produced, and there can be no prescription, because it was shewn when there was none; for there was no pretence of any vicar, or tithes paid to him, till the year 1610.

But it was answered, it may be difficult always to shew the exact time, when a vicarage first commenced, or when it was first endowed.

By the constitution of *Othobon*, 21 Apr. 52 Hen. 3. *universi religiosi, qui ecclesias in proprios usus habent, si vicarii non sunt positi in eisdem infra sex mensium spatium, vicarios diocesani præsentare non emittant, quibus sufficienter pro facultate ecclesiarum assignent portiones, alioquin diocesani id facere studeant.*

Therefore, though the church of *Lakenham* was appropriate before the statutes 15 Rich. 2. and 4 Hen. 4. which require that on appropriation care be taken that there should be a vicarage endowed, otherwise the appropriation shall be void; and it was insisted, that those statutes extend only to the time future, and, consequently, on this appropriation there might be no endowment
of

of a vicar ; and it is most probable it was not, because the monks supplied the cure till the dissolution, and had no tithes, but an annual pension ; yet it appears by this constitution, that the religious were obliged to create a vicar and endow him, otherwise the bishop was required to do so ; and this construction extends to all precedent appropriations, and therefore the presumption is, that there was a vicar endowed pursuant to this construction.

How the cure came after to be supplied by their own monks does not appear ; perhaps, those monks might be presented and instituted, though they are called *capellani* ; or perhaps, the pope might by bull allow the prior to appoint one of his monks to officiate, and serve the cure, as in the case of *Briton* and *Wude*. *Cro. Jac.* 515. *Supra* 330.

The prior of *Deintree* had the advowson of *Norton* appropriate, and the vicarage was endowed with the altarage and small tithes, and so continued till the reign of *H. 6.* when on petition of the prior to the pope, in regard that the priory was poor, the pope granted *quid de cetero* the prior should constitute one of his monks to officiate in the cure, and so it continued to the dissolution ; but held, this did not dissolve the vicarage.

It is true, that this was an endowment after the statute 4 *H. 4.* but though this was a reason given, that the pope could not dissolve a vicarage after that statute, yet it was also resolved, that it could not be done by the pope, though the ordinary might do it.

It is certain, that the vicarage of *Lakenham* is mentioned in the patents 1 *Edw. 6.* and 7 *Edw. 6.* so that the church was looked upon to have a vicarage then. And though it does not appear how the endowment originally was, it is certain that they were often times uncertain and variable. At first the endowment might be small, and afterwards enlarged. *Selden*, in his history of tithes, saith, speaking of the first appropriations, " Nor was there any perpetual certainty of the profits of their presentee (that is the person, the appropriate person presented to any vicarage) till the monks by composition with the ordinary, or by their own ordinance, (which prescription after confirmed), appointed some yearly salary in tithes or glebe or rent for the perpetual maintenance of the cure ; which salaries became afterwards the endowments of perpetual vicarages."

Grimes & al' against *Smith*, 12 *Co. 4.* in the exchequer. The case was, The abbot of *Selby* held the parsonage of *Lubbenham* in the county of *Leicester* as appropriate, which came to the crown by *Supra* 158.

1732. — by statute 31 H. 8. who in the thirty-seventh year of his reign granted it in fee-farm, under which grant the plaintiff claimed. The defendant got a presentation from queen *Elizabeth* to this church, and insisted, that the impropriation was made 22 *Edw.* 4. and no endowment of a vicarage, and, consequently, the appropriation void; and there was no instrument or direct proof of any endowment; but since, during the appropriation supposed, there had been a vicar inducted, as a vicar rightfully endowed, it was resolved by the court, that the vicarage, in respect of its continuance, was rightfully endowed. And the court said, that it would be dangerous to examine into the original of impropriations of parsonages and endowments of vicarages.

In the present case, there is a proof of payment of vicarial tithes to the vicar for near one hundred years, while *Richard Collin, Tuck, Wright, Ward, Armiger, Menfor*, held this farm, and a constant reputation, that all tithes but of corn belonged to the plaintiff; and two decrees of this court in his favour, which raise a strong presumption for him.

It is possible, that the endowment at first was but small; that some pension was paid to the incumbent; that when the dean and chapter had the parsonage, they might vary or augment the endowment of the vicarage. In *Flini's* lease 33 H. 8. the demise of predial and personal tithes only looks like a reservation of the rest for the vicar; and the prescription, which is evidence of an endowment, need not to be such as admits no proof when it was not paid; for the endowment may be within time of memory; but a prescription allowed by the canon law of sixty years, or thereabouts, is a time sufficient to induce a belief, that there was some foundation for the payment, though it does not exactly appear when such payment began. Besides, there was on the 6th of *November* 1735, to which time the debate of the cause had been put over, further evidence given of several presentations by the dean and chapter to the vicarage, and the vicars instituted thereon, some of which were said to be in pursuance of the constitution of *Othobon*.

The first institutions were 1312, which were followed by others in 1327, 1359, 1361, 1375, 1386. In the year 1569 there was a sequestration granted of the profits of the vicarage by the bishop, in order to supply the cure in the vacancy; and in 1610 there was a presentation again. Besides, there were produced accounts of the

the chamberlains or treasurers of the priory, in the time of *R. 2.* and *H. 6.* wherein they account for 5 s. *de terris pertinen' vicario de Lakenham*; 4 l. 4 s. 4 $\frac{1}{4}$ d. *de ecclesiâ de Lakenham*; 14 l. *de manerio cum decimis*; et 19 *R. 2. de manerio* 20 l. *de decimis* 4 l.

It was further proved, that the reputation was, that the vicar had the tithe-hay, as well as other vicarial tithes, and that the payment of the 8 l. yearly by *Catlin, Wright, &c.* was reckoned to be for the tithe of hay, clover, turnips, and all other small tithes, and that tithe had been once paid in kind to the vicar.

It was further insisted, that the vicarage or rectory of *Lakenham* came not to the crown either by the statute 31 *H. 8.* or 27 *H. 8.* but the king 30 *H. 8.* translated the priory and convent to a dean and chapter, and transferred the possessions of the priory to the dean and chapter; so that these possessions not being surrendered to the crown, nor vested in the crown by any act of parliament, there could not be any exemption from tithes; for unity of possession cannot be an exemption longer than the unity continues; and it is only by force of the penning of the clause in the statute 31 *H. 8.* that the lands given to the crown by that statute are discharged, where there had been a perpetual unity till the dissolution by that statute.

And the court was of opinion, that the unity of possession of the manor and rectory of *Lakenham*, in the hands of the prior and convent, and after, of the dean and chapter of *Norwich*, till 1 *Ed. 6.* did not exempt the demesnes of the manor from tithes, when they came to be severed.

That by the letters patent, 9th *Nov. 1 Ed. 6.* the rectory was granted to the dean and chapter of *Norwich*, and, consequently, the grant of it by the patent 7 *Ed. 6.* to *Thomas Gresham* was void; and although there was an exception in the grant 1 *Ed. 6.* of the manor of *Lakenham*, rectory of *Hemilby, &c.* and all lands, tithes, &c. to the said manors, rectory, *aut eorum alicui quoquomodo spectant*, that did not except any tithes, parcel of the rectory of *Lakenham*, which was before expressly granted to the dean and chapter, much less the tithes belonging to the vicarage.

Thus the reputation of tithes of hay, and all vicarial tithes belonging to the vicar, and the payment of them by the rest of the parish, and the payment of the 8 l. yearly, or some other sum, as a composition for them by the owners and occupiers of *Lakenham* farm, above one hundred years, and the two former de-

crees

1732. crees in favour of the vicar, was a sufficient evidence of some ancient endowment.

And the court decreed that the defendants *Bardwell*, *Balls*, *Buttrice*, *Proctor*, and *Rix*, should account with the plaintiffs, and pay the tithes demanded by the original bill, with costs; and that the defendant's cross-bill should be dismissed with costs.

4 Br. P. C.
235

The defendants appealed a second time, stating the same case as before, and insisting, that having given full evidence of the exemption, there was a sufficient foundation for the court, either to establish the same, or at least to direct an issue for trying it. That by the decree the appellants were to account for the tithes of all the lands in their respective occupations; whereas it was plainly proved, that sixty acres, part of the lands in the occupation of the appellant *Bardwell*, were part of the manors, and lay in the several parishes of *Eaton* and *Ameringhale*, which had never paid any vicarial tithes, or any composition for the same, and that about twenty-four acres, other part of the said farm, lay in the parish of *Saint Stephen* in the county of the city of *Norwich*, and there was no proof, that the respondent was entitled to any portion of tithes out of lands not within the parish of *Lakenham*. That the appellants were to account for the tithes of hay, although the respondent had made no manner of proof of any title to such tithes, or that the same had ever been taken by the vicar; besides, the tithe of hay is a great tithe, and not vicarial; and upon hearing the cause of *Folchier* against *Ward*, whereon the respondent in great measure founded his demand of any tithes whatsoever, the then defendant was not to account for the tithes of hay, but, by the minutes taken on the hearing of that cause, those tithes were expressly excepted.

The respondent likewise stated the same case as before, and in addition to the reasons there given, it was now said to have appeared upon full proof, at the last hearing, and also by the proofs in the former cause of *Folchier* against *Ward*, that valuable compositions for the vicarial tithes of *Hall* farm, were peaceably paid to the vicar of the parish by the tenants under Lord *Berkely* for many years together; and though disputes were afterwards raised about the said tithes, yet the same had been adjudged to the vicar and his lessee by the former decrees.

After hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decree therein complained

complained of, affirmed: it was further ordered, that the appellants should pay to the respondent, *John Fox*, 200 l. for his costs in respect of the said appeal.

1733.

Tr. 6 & 7 Geo. II. A. D. 1733. Scac.

Gibb v. Goodman and others. [Bunb. 328.]

BILL for tithes by the vicar of *Bedminster* in the county of *Somerset*.

Where the day of payment of a *modus* is admitted in an answer, it may be supplied by evidence, but not if omitted in a bill to establish a *modus*.

The defendants insisted on a *modus* of 4 d. for the milk of each cow, and 6 s. 8 d. for every tenth calf, for the tithe of all calves. *Note*, no day was alleged in the answer, which, according to former precedents, seemed to be a fatal objection; yet, by the whole court, the defendant was permitted to prove the day by depositions; and thereupon the court directed an issue to try the same, with liberty to indorse the *poslea*.

Note. The lord chief baron took this distinction, that in an answer the day may be supplied by the evidence, so as to be a foundation for the court to direct an issue; but in a cross-bill to establish a *modus*, a day must be expressly alleged.

Vide infra.

Note. It was objected, that the 6 s. 8 d. was too rank; and it was not alleged that any thing was payable, if there were less than ten calves; both which seemed material objections; but the court thought a verdict might make it good.

Modus of 6 s. 8 d. for one calf in ten, and not said, "and so in proportion, if there be a less number than ten," is bad.

May 20, 1734, this cause came on again upon the return of the *poslea*; the jury found the issue for the *modus* for the milk, and that the *modus* of 4 d. was payable at *Easter*; so as to that, the bill was dismissed with costs, both at law and in equity.

As to the other *modus* for calves, the jury found it, but no day when payable; but upon the objection, that it was not said, "and so in proportion, if there be a less number than ten;" and the jury not having found it so, the defendant was decreed to account for tithe of calves, but no costs were allowed on either side at law, as to this *modus*, the fact being for the defendant, the law for the plaintiff (x).

(x) This is erroneous; the plaintiff had his costs in respect of tithe of calves. 2. Wood's Decr. 347.

1733.

Tr. 6 & 7 Geo. II. A. D. 1733. Scac.

Salmon and others v. Rake. [Bunb. 176.]

Injunction to the spiritual court, to stay a libel for tithes, where a *modus* is sought to be established.

A BILL was brought for establishing *moduses*, and also for an injunction to stay the defendant from proceeding against the plaintiffs in the ecclesiastical court. The defendant admitted some of the *moduses*, but absolutely denied the most and greatest of them. And by the whole court of exchequer—Though the plaintiff here has not put in a plea to the libel in the spiritual court, yet since that court cannot try *moduses*, and the bill prays an establishment thereof, an injunction must be granted.

M. 7 Geo. II. A. D. 1733. Dom. Proc.

Lewis v. Griffith. [4 Br. P. C. 314.]

A parson may sue in a court of equity for his tithes, be the amount of the demand ever so small.

THE dean and chapter of *Worcester* being in the right of their church seized in fee of the impropriate rectory of the parsonage of *Old Radnor*, and all manner of tithes arising and renewing yearly within the said parish, by indenture of lease under their common seal dated the 25th of *November* 1723 demised the same to the most noble *James* duke of *Chandois*, his executors, administrators, and assigns, from the date of the said lease, for twenty-one years, under the yearly rent therein mentioned.

And by indenture dated the 15th of *February* 1728, the duke assigned the said lease and premises to the plaintiff, his executors, administrators, and assigns, subject to the said yearly rent, whereby the plaintiff became well entitled to all the tithes and duties arising and growing within the said rectory and the tithable places thereof.

The defendant, after the said 15th of *February* 1728, occupied a messuage and lands within the said parish, and particularly thirty acres of meadow and pasture ground; but neglecting to tithe the same for the years 1729 and 1739, or to make the plaintiff any satisfaction for such tithes; the plaintiff in *Michaelmas* term 1730 filed his bill in the court of exchequer against the defendant for an account and satisfaction thereof.

To this bill the defendant put in his answer, and thereby admitted it to be the general opinion of the country, that the plaintiff was owner of the tithes; said, that he occupied one messuage, a
small

small garden, five acres of arable, four acres of pasture ground, and an acre and a half of meadow; that as to the meadow, he was tenant at will, at 11. 6s. a year, and that it was, in the general opinion, tithe free, and never any tithe-hay was paid for the same; but being only tenant at will, and the value of the tithe small, and rather than give any colour for a suit, he ordered his servant, mowing there in 1729, in case the plaintiff's agents demanded tithe-hay, to set it out: that soon after, *Henry Davis*, the plaintiff's servant, who had been a tithe-gatherer thirty years, being offered to have the hay tithed, answered he never gathered tithe from thence, and would not meddle with it, and they might carry it away; whereupon the hay was carried home untithed. That in the year 1730, *Edward Turner*, the plaintiff's agent, came to the said meadow, and saw the hay tithe, and opened one of the cocks, and imagining no tithes were due, went away, and said he would consult *Howell Lewis*, the plaintiff's chief agent, and soon after returned and said, he would not meddle with it, whereupon the defendant carried it home: and that having grazed the said meadow each year till the middle of *May*, he had but little hay, and believed the tithe thereof was not worth above 1s. 6d. each year; but knew not how the said meadow became exempt from the payment of tithes.

Issue being joined, several witnesses were examined, who proved the demand of tithe-hay of the said meadow, and that the defendant forbid the plaintiff to take the same, but no proof was given of the pretended exemption.

On the 15th of *November* 1733, the cause was heard before the barons of the exchequer, who decreed, that the defendant should account with and satisfy the plaintiff for the value of the tithes of hay of the said meadow for the year 1729 and 1730; and it was thereby referred to the deputy remembrancer to take such account, and to make his report with all convenient speed; and the cause was to continue in the paper of causes, to be further heard upon the coming in of the said report. In pursuance of this decree, the deputy on the third of *February* 1734 made his report, and thereby certified, that there was due to the plaintiff from the defendant for the value of tithe-hay of the said meadow, for the years 1729 and 1730, the sum of 9s. And the cause being heard upon this report, on the 10th of the same month, the court decreed that the report should be affirmed, and that the defendant should pay the plaintiff the said 9s. reported due, to-

1733.

gether with costs of the suit, to be taxed; and which were afterwards taxed at the sum of 5 l. 5 s. 8 d.

The defendant appealed from this decree, insisting, that the bill being founded on a supposed fraud in the appellant in concealing his tithes, and praying a discovery and account of the tithes so supposed to be concealed; and the appellant having, by his answer, denied any concealment; the respondent, in order to entitle himself to any decree upon such a bill, ought to have verified the allegations of it, but which he had not attempted to do; that the appellant having stated the matter of fact as to the tithe of the meadows, and denied all fraud; and as no fraud was attempted to be proved upon the commission, or insisted on at the hearing, nothing remained in controversy between the parties, or to be accounted for, but a demand of 3 s. or 4 s. for which the respondent might have had; and ought to have taken his remedy in a court of law, and not brought the appellant into a court of equity, for a demand so very inconsiderable as to be beneath the dignity of the court to take any notice of. But, supposing the decree proper, there was not the least colour to decree the appellant to account for the tithe-hay of the year 1730, which he had actually set out, and which the respondent's agent might have carried away, but would not meddle with; nor was there any evidence, that the hay in question was worth 9 s. If, however, it was really worth that sum, the decreeing of costs, which amounted to 5 l. 5 s. 8 d. was surely a punishment more than equal to the appellant's crime in not paying 9 s. and especially as he had sworn in his answer that the respondent never demanded satisfaction. Under these circumstances, therefore, it was hoped, that the decree would be reversed, and the respondent's bill dismissed with costs.

On the other side it was said, that tithes in kind are due of common right, and no presumption from report only ought to be of any weight to avoid a demand so founded; and though the appellant, by his answer, had set up a pretence of exemption from tithes, yet he had given no proof of it, nor had he set up any *modus* or composition in lieu of tithes; that it appeared clearly from the proceedings in the cause, that the appellant controverted the respondent's right to the tithes; and therefore it was proper to sue in a court of equity in order to ascertain and settle such right; and that the appellant's answer, as to his not disputing the respondent's right, was inconsistent with itself; for though he admitted, that he would have paid tithe for his hay, had he thought

the

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1733.

the respondent would have required it, yet he did not even submit by his answer to pay any tithe for the same, though the respondent had required it by his bill.

After hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decree therein complained of, affirmed.

Decree affirmed.
Lords
Journ.
v.25. p.141.

H. 7 Geo. II. A.D. 1733. Scac.

Beaver v. Spratley. [Bunb. 333.]

THE plaintiff as lessee of Mr. *Blagrove*, impropiator of *Stratfield Mortimer* in the county of *Berks*, brought his bill for tithe of wheat, barley, &c. and set forth, that by the custom in that parish, all the occupiers ought to give notice to the person entitled to the tithes of setting forth their tithes, or there was some other custom of the like nature, and that the defendant had not given notice, and prayed an account.

Bill for tithes, laying a custom for the parishioners to give notice of setting out tithes, or that there is some other custom of the like nature, held bad, and dismissed with costs.

Now, upon the hearing, it was objected for the defendant, first, that it was unreasonable the occupier should be obliged to give notice to the person entitled to the tithes, for he might live one hundred miles out of the parish.

Barons *Carter* and *Comyns* thought there was something in the objection, though the lord chief baron thought this well enough, for notice to the servant would be good notice in that case.

The second objection was, that it was too uncertain, "or some other custom of the like nature;" to which it was answered, that this bill was not to establish a custom, it was only for an account; and the custom was only alleged as an inducement to that demand; though in the first case greater certainty was required, because it is to be the foundation of an issue, which is generally directed before a court of equity establishes a custom.

But by the whole court, this is a fatal objection to the custom, and that being the foundation of the plaintiff's demand, we cannot decree an account, without first establishing the custom; and the bill was dismissed with costs.

1733.

H. 7 Geo. II. A. D. 1733. Scac.

Smith v. Morgan. [Bunb. 335.]

The court decreed plaintiff his costs generally on a bill for thirteen different sorts of tithes, though the plaintiff proved but one species of tithes due, nor did he abridge his demand by his replication.

A BILL was preferred for twelve or thirteen different sorts of tithes, and the plaintiff did not abridge his demand by his replication; upon the hearing it was referred to an account, but costs were reserved generally till the report came in.

Now upon the report it appeared, the defendant was indebted to the plaintiff for one species of tithes only, *viz.* wood 40l. but not for any of the other tithes demanded by the bill; and therefore it was insisted for the defendant, that the plaintiff should have his costs, only as to the wood, which was reported for him, but that he ought to pay costs for all the others demanded, and which he had not proved.

Note. This seemed very reasonable, the plaintiff not having abridged his demand by his replication, but having put the defendant to the trouble and expence of entering upon the proof of the other matters, but the court (too hastily) decreed costs generally to the plaintiff (y).

M. 8 Geo. II. A. D. 1734. Scac.

Laites and others v. Christian. [Bunb. 340.]

Issue directed to try a *modus*, though not proved exactly as laid in the bill.

BILL by the owners and occupiers of lands in the parish of *Creshtwaite* in the county of *Cumberland* to establish *moduses*; one in the two forests of *Barrowdale* and *Wythburn* within the parish, the other within the parish at large; but there was no variance of the *moduses*, only as to the sums payable; so that there were in effect the same as to the point in dispute now, which was this:

The plaintiffs by their bill laid their *moduses* to be for every tenth lamb, payable on *Monday* next after *Midsummer-day*, after the lambs fallen, except such as were not alive on *Midsummer-day*, in lieu of lambs, and the wool of such lambs, which were called hog-sheep.

(y) The court would certainly not so decree costs at this day.

The

The defendant in his answer admitted there were such *modus*es payable, as in the bill, for lambs only, but not for the wool; and most of the witnesses agreed with the bill, as the defendant did, except the being paid for the wool.

The plaintiffs had but one or two witnesses to prove (and in the parish at large only) that the *modus* was for lambs alive on *Midsummer-day*; all the rest of their witnesses proved that it was for such as were alive on *Monday* next after *Midsummer-day*; which varied from the bill, and therefore the defendant objected, that the plaintiffs had not proved the *modus* as laid in the bill; but the defendant having admitted, and his witnesses agreeing with the bill, but differing only as to the extent of it, the court thought here was a sufficient ground to grant an issue to try the *modus*es, with liberty for the judge to indorse the *posse*, which they accordingly directed (z).

P. 9 Geo. II. A. D. 1736. Scac.

Colchester v. Russell. [2 Wood's Decr. 373.]

THE plaintiff was an inhabitant and occupier of lands in the parish of *Westbury*, in the county of *Gloucester*, and the defendant was vicar of the said parish. The object of the bill was to

The vicar of Westbury, in Gloucestershire, is only entitled to 1d a year

for every ancient garden, in lieu of tithe fruit and herbs; to 1 d. for every cow in lieu of tithe milk; and to 5 d. a pipe of cyder, in lieu of the tithe of the apples of which it is made; but he is entitled to the tithes of calves in kind.

(z) Bill by the vicar of *Croftswaite* in the county of *Cumberland* for tithes.

The defendants insisted on a customary manner of payment of tithe-wool of the elder sheep, by weighing the wool, and delivering the tenth part without fraud to the vicar, without fight and touch, but this was over-ruled on the authority in *Hob.* 107. They also insisted on a *modus* in lieu of lambs and the wool of lambs the first clipping, when they are called hog-sheep, viz. 11 d. for every tenth lamb, and so in proportion for a less number. They also preferred a cross-bill to establish this *modus*, but it varied from that in the answer, that whereas there it was said, "and so in proportion," &c. that fact not being true, here the proportion for each under ten was set out, as for nine lambs nine-pence halfpenny, &c.

The plaintiff examined no witnesses in the cross cause, but obtained an order, that the depositions in the original, should be read in the cross, cause.

Now, upon the hearing, the plaintiff in the cross cause offered to read the depositions in the original cause; but it was objected, that the *modus* in the cross cause was a different *modus* from that in the answer to the original bill, and therefore was not in issue on that examination; and of that opinion was the whole court; so the plaintiff had a decree for an account in the original cause, and the cross-bill was dismissed with costs. *Burb.* 321.

1736.

establish the following *modus*es, 1st, One penny for every ancient garden, at *Easter* yearly, or so soon after as demanded. 2dly, One penny for every milch cow kept and depastured therein at *Easter* yearly, in lieu of tithe-milk of such cow. 3dly, One halfpenny for every calf weaned and bred up in the parish, in full for the tithe of such calf. 4thly, Five-pence a pipe for all fruit made into cyder, and so after that rate for a greater or less quantity.

The vicar denied the *modus*es, and insisted on tithes in kind.

The court dismissed the bill with costs, as to the *modus* for every calf weaned and bred up in the said parish.

As to all the other *modus*es, issues were directed to try the same as laid and alleged in the bill.

The validity of the three several *modus*es was accordingly tried by a special jury, and a verdict was found for the plaintiff; but on the 9th of *November* 1736 the court directed a new trial on the first and third issues, upon payment of costs.

The court established and confirmed the *modus* of one penny for every milch cow depastured in the parish, in lieu of the tithe-milk of such cow, and ordered, that the same be observed in the said parish.

A new trial was accordingly had on the first and third issues, and another verdict given for the plaintiff.

The court thereupon confirmed and established the *modus*es for the garden and the pipe of cyder, as laid and alleged in the bill; and ordered that the same be for the future strictly observed in the said parish.

Tr. 10 Geo. II. A. D. 1736. Scac.

Steers v. Brassier. [2 Wood's Decr. 373.]

Tares cut green, and given to cattle, or cut green and harvested, and made into winter fodder in the nature of hay, are tithable, and are a great tithe.

BILL by the impropiator of *Westerham*, in *Kent*, stating, that the defendant had sowed part of his farm with tares or vetches, and had cut some of them green and carried them off to feed his horses with; that he had cut the other part, and made the tares into dry and winter fodder, but had not set out the tithes thereof, or compounded for the same. It therefore prayed a discovery, of the number of acres he had sowed with tares; how many he had cut green and carried off to feed his cattle with; and how many he had cut and made into dry winter fodder; and what the value of the tithes

tithes thereof amounted to; and that the defendant *Lewis*, the vicar, may set forth whether he claimed any and what right to the tithes of the said tares.

The defendant said, that he occupied several acres of land part of *Court Lodge Farm*, and had sowed the same with tares, part of which he had cut green to feed those cattle with which he kept for the plough; and that he had not set out the tithes thereof, because no tithes of tares when cut green to feed cattle of the plough with had ever been paid or demanded in the parish; that he had cut the residue of the said tares, and had made them into dry fodder in the nature of hay; that he had set forth the tithes thereof, and had given the plaintiff notice thereof, but that she had refused to take the same away; and that the vicar, he believed, took them away. He denied that he had ever pretended that the tithes of tares in the parish belonged to the vicar; and said, that he had never known that tares cut green, and harvested, and made into dry fodder, had paid tithes, or that the same had ever been demanded by the impropriator, or that any payment had been made in lieu thereof.

The defendant *Lewis* said, that he had been vicar of the parish for twenty-nine years past, and was, as such, entitled, by an endowment, to all small tithes, and to the tithes of hay; and that if any tithes were due for tares cut green, the same belonged to him, they being in the nature of herbage or agistment tithes; and being endowed with the tithes of hay, he was also entitled to the tithes of tares cut and made into winter fodder.

The plaintiff replied; the defendants rejoined; and witnesses were examined, except on the part of the vicar; and upon hearing counsel, and on full debate, the court ordered *Brassier* to account for the value of the tithes of those tares which he had cut green and fed his cattle with; and the vicar to account for the value of the tithes of the tares which *Brassier* had cut and made into dry winter fodder, and which the vicar had carried away; the defendants to pay the plaintiff her costs.

The deputy reported, that there was due from *Brassier* 8s. for tares cut green, and from the vicar 16s. for the tares he had carried away; and on the 16th of *June* 1737 the report was ratified and confirmed (a).

(a) In the case of *Hodgson v. Smith*, Tr. 1 Geo. 1. *Wood's* Decr. 21. the bill stated, that the governors of *Sir John Hoskins's* hospital by indenture dated the 26th of *May*

1737.

Tr. II Geo. II: A. D. 1737. In Cane,

Williams v. Cullum. [Mr. Joddrell's MSS.]

THIS bill was brought to be relieved against a resignation bond to resign a benefice to the ordinary upon demand of the defendant, the patron, and also for an account of tithes.

With

1710 demised, granted, and to farm let to the plaintiff, all their tithes of corn, grain, hay, fother, hemp, lambs, wool, pigs, together with all manner of other tithes of the said governors, in right of the hospital, arising in *Wellen* otherwise *Willing*, and *Wickham* otherwise *East Wickham*, in the county of *Kent*, to hold to him, his executors, and administrators, for forty years; that, by virtue of the said lease, the plaintiff became entitled to all the said tithes, and to all manner of other tithes of the said governors in right of their said hospital arising in *Wellen* otherwise *Wickham* aforesaid; that the defendants had been severally occupiers of arable land for four years past, and had ploughed and sowed the same with barley, oats, tares, &c. and carried away the same without setting out the tithes thereof; that they also had ewes and other sheep, which had lambs and wool, and several other tithable matters and things. The bill therefore prayed to be relieved in the premises.

The defendant *Smith* stated, that at *Michaelmas* 1713 he held a farm and lands, part of which lay within the chapelry of *Wickham*, and the rest in the parish of *Plumstead*; that by reason of the scarcity of meadow in *Wickham*, the inhabitants there used to sow tares and cut the same green for fother, never intending the same for seed, and that he sowed some tares for that use, and fothered his cattle therewith; that the tithes of all hay, clover, and such fother grass, belong of right to the vicar of *Plumstead*, who supplies the cure of the chapel of *Wickham*, to whose vicarage the chapel belongs, and the tithes of hay, clover, grass, wool, lambs, and all other small tithes whatsoever arising within the said chapelry of *East Wickham* and parish of *Plumstead*, do belong to, and time out of mind have been held by the vicars there; and he set forth all the small tithes he had within the said chapelry, which he said he had paid to the vicars, and that what corn tithes he had, the plaintiff had taken them all, excepting only the tithes of the said tares.

The defendant *Webb* set forth that the present vicar of *Plumstead* let all the vicarial tithes of *East Wickham* to the parishioners and inhabitants there, who usually sowed peas and tares for fother, which they cut green for their cattle, and that the said vicar claimed and had always enjoyed the tithes of all hay, fother, and all other tithes, except corn tithes, arising within the said chapelry; that the lessees of the hospital always had the great tithes in the chapelry, but not the tithes of hay and clover, and that he had agreed with the vicar for all the time demanded by the bill for all the tithes of hay, grass, clover, and all other tithes, except corn; and he set forth the tithable matters he had.

The defendants insisted, that *East Wickham* is a chapelry annexed to the parish of *Plumstead*, and that the other tithes belong to the vicar of the said parish, with whom they had compounded, and not to the plaintiff, or to the governors of the hospital, or to their lessees.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and the cause came on to be heard the 14th day of *June* last; and upon reading the

With regard to the tithes, the defence was as to part, that an agreement was made between the incumbent and the defendant to pay so much in satisfaction. But it appearing by the evidence to have been made by parol only, it was held clearly within the statute of frauds, as it related to lands and tenements, and therefore void.

As to other part of the tithes, the defendant in his answer set out a *modus* as a bar to the plaintiff's prayer to have a general account. The evidence proved a *modus*, but with some variation from that in the defendant's answer; which was argued to be no evidence to support it; for in cases of this kind, when a *modus* or custom is set up or prescribed for, the party relying on it must hit the bird in the eye, and prove it precisely; and therefore here is no foundation for the court to direct an issue to try it. And the Master of the Rolls seemed at first to be strongly of this opinion. But a case of *Worthy v. Goodwin* was cited, which was in the exchequer in chief baron *Pengelly's* time, where, in such a case as this, it was held sufficient reason to induce the court to direct a general issue, whether there was a *modus* or not. For the chief baron said, if there be any *modus*, and we have great reason to think there is, though it be different from that put in issue by the defendant's answer, yet it is a sufficient reason why we ought not to direct a general account to be taken of the tithes in kind; and such issue was directed. Upon this case being cited, the Master of the Rolls seemed to alter his opinion, and to think that he ought to direct an issue. But the parties agreed without any decree.

Though the *modus* proved be not precisely the same with that laid; yet, if the court think that there is a *modus*, they will direct an issue to try it.
Qu. Whether not the case of *Wortley v. Goodwin*. If so, that was in Lord C. B. Reynolds's time.

the said lease, and the proofs in the cause, it was then ordered that the cause should stand over, that, in the mean time, the court might consider, whether the tithes of tares, cut green for fother, did belong to the plaintiff, or to the vicar of *Plumstead*; and the cause now coming on this day,

The court declared their opinion, that the tithes of the defendants said tares, cut green and used for fother, belong to the plaintiff, and not to the vicar of *Plumstead*.

It is thereupon ordered and decreed, that the defendants shall account with and satisfy the plaintiff for the value of the tithes of the tares by them cut green and used for fother, which the defendants respectively had within *Welling* and *East Wickham* in 1714, with costs, except for the examinations relating to the small tithes, for which the defendants are to have costs, and it is hereby referred to the deputy remembrancer to take the said account, and to tax the said costs.

Pursuant to which order the deputy remembrancer made his report dated the 15th of *December*, and upon reading the said order and report, there not being any exceptions taken thereto, the court ratified and confirmed the same, and ordered that the defendant *Smith* do forthwith pay to the plaintiff the 2 l. 5 s. so reported due, for the value of nine acres of tares by him cut green in 1714, and that the defendant *Webb* do pay 2 s. 6 d. for his tithes of an acre and an half of tares cut green as aforesaid.

1737.

H. 11 Geo. II. A. D. 1737. In Canc.

Clifton v. Orchard. [1 Atk. 610.]

The plaintiff entitled to his costs at law only, and not in equity, though a *modus* be established by two verdicts, on issues directed by the court to try the same.

THERE having been two verdicts in this case in favour of the plaintiff in equity, the *modus* was now established with the costs at law, but none were given with regard to the proceedings in equity. For lord chancellor said, the suit in this court was merely for the security of the plaintiff, and to prevent any farther impeachment of his right to an exemption from the payment of tithes in specie, and that this was like the case of a bill brought to perpetuate the testimony of witnesses, wherein costs are never given against the defendant; that the plaintiff might have applied for a prohibition, and if he had succeeded therein at law, he would have had his costs, and he ought to have the same advantage with regard to the proceedings at law directed by this court, but that there was no pretence for any other costs *.

* 2 Atk. 143

His lordship decreed the *modus* to be established, and ordered the defendant to pay costs to the plaintiff, in respect to the proceedings at law, to be taxed; but as to costs in equity relating to the *modus*, his lordship did not think fit to award any to be paid by either of the said parties †.

† Reg. Lib.
a. 1737. fol.
207.

P. 11 Geo. II. A. D. 1738. Scac.

Burslem v. Spencer; et à contra. [2 Wood's Decr. 380.]

THE rector of *Great Frensham*, in the county of *Norfolk*, claimed all the tithes thereof in kind; and stated, that the defendant had from *Lammas* 1735 occupied a grass farm in the parish, and had depastured thereon milch cows, a great number of unprofitable cattle, and several horses which had been used for the draught and plough during part of that year in another part of the said farm lying in other parishes, to wit, in *Little Frensham* and *Little Dunham*; and that the said cows had calves. The bill also stated, that of the milk of the said cows there was due to the plaintiff the tenth meal during the time they yielded milk in the said year, and the tenth calf of the said cows, and a proportionable tithe for the draught horses and unprofitable stock; but that the defendant pretended, that the plaintiff was entitled only to the

ninth night's and tenth morning's meals from *May-day* to *Lammas-day*. The bill therefore prayed a discovery of the quantities, qualities, and values of his tithable matters and things, and an account and satisfaction for the same.

The defendant said, that no such tithe-milk as demanded by the bill had ever been paid in the parish; but that, time immemorially, there had been paid, by every occupier of lands therein, the whole tenth morning's meal of milk mixed together with the milk of the night before, the cream being first taken off from the said night's milk, of all their respective cows, from the 9th of *May* to the 1st of *August* every year, made into cheese, called two meal cheeses, and delivered to the rector of the said parish at his house in *Great Frensham* aforesaid, on *Lammas-day* yearly, or so soon after as demanded by the rector; and also one whole meal of milk of their said cows made into a cheese, and delivered to the said rector at the place aforesaid on *Whitfun-Monday* yearly, or so soon after as demanded by the said rector; and that the said cheeses were so delivered and accepted in lieu of all tithe-milk arising in the said parish. The defendant also said, that he believed that there were other tithes, not demanded by the bill, which were not payable in kind, particularly the tithe of chickens, for which there was yearly payable at *Easter* two eggs for every cock, and one egg for a hen. He also said, that he claimed a custom of paying no tithe in kind for hearthwood, honey, and apples, but in lieu thereof a hen, called a loak-hen, on *St. Thomas's-day* yearly. He admitted, that the plaintiff was rector, and entitled to the great and small tithes of the parish in kind, except as aforesaid; and that he had for fifteen years past occupied a considerable farm in the parishes mentioned in the bill; but he said, that he could not set forth the value of the tithes of that part lying in *Great Frensham*, for that he had, for several years, compounded for the same, except for the loak-hen, eggs, and *Easter* offerings, and had paid the same to *Lammas* 1735; and he set forth the quantities and qualities of the tithable matters during the time demanded by the bill. He admitted, that he had paid tithes in kind of milk for twenty cows last year, which, he said, was in his own wrong, as tithe-milk was not due; and that he could not set forth the value of the whole tenth morning's milk mixed as aforesaid. He insisted, that no tithes were due for draught horses, yearlings, and two year olds; and that he had been

The defendant says, there is a custom to make the ninth evening's milk, when skimmed, and the tenth morning's unskimmed, from *May* 1, to *Aug.* 1, into two cheeses, and one whole meal's milk into one cheese, and deliver the first on *Lammas-day*, and the second on *Whit-Monday*, at the parsonage, in lieu of the tithe milk of the whole year; that there are two eggs payable for every cock, and one egg for every hen, at *Easter*, in lieu of tithe chickens; that a loak-hen is payable on *St. Thomas's-day*, in lieu of the tithes of firewood, honey, and apples, *Anst.* 322. *notis.*

He admitted, that he had paid tithe milk in kind; but said, it was in his own

wrong; and insists, no tithes are due for draught horses, yearlings, and two year olds.

always

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always ready to pay his just dues, and had paid all his great and small tithes to *Michaelmas* last; and that, in the year 1728, he came to an agreement for the same with the plaintiff for 12l. a year.

Cross-bill to establish the said *modus*.

The defendant filed his cross-bill; and set forth the particular lands, and the number of cattle he had fed thereon, and insisted that no tithe-milk was due in kind, and he stated the customs and *moduses* as in his answer to the original bill.

Issues directed to try the *modus* in lieu of milk and loak-hen.

The rector answered, and denied the same; the plaintiff replied; the defendant rejoined; and witnesses were examined in both causes; and upon hearing counsel for all parties, and reading several depositions, and on full debate; the court directed an issue to try, before a special jury, the validity of the said *modus* and custom of milk and loak-hen; save and except as respected the lands in the occupation of *H. Cafe*.

The defendant ordered to pay tithes for calves and depasturing barren cattle; but to be allowed for as many as were necessary to plough the land. The bill as to yearlings and two year olds dismissed. The *modus* as to chickens established.

The court further ordered the defendant to account for the tithes due for his calves and unprofitable cattle depastured there during the time demanded by the bill; the deputy remembrancer to inquire, whether the proportion of the defendant's cattle used for the plough depastured on the defendant's lands in the said parish of *Great Frensham*, were more than sufficient to cultivate the said lands, and how many more; the costs to be reserved as to the said matters; and the original bill, as demanding tithe of the yearlings and two year olds, to be dismissed with costs; so much of the original bill as demands tithes of chickens to be dismissed with costs to the time of filing the special replication; and the *modus* of eggs in lieu of chickens, set up and insisted on by the defendant's answer to the original bill, and also by the cross-bill, to be established with costs to the time of the plaintiff *Burftem* filing his special replication.

A verdict against the *modus* as to tithe milk; and in favour of that

A trial was accordingly had; and the jury found a verdict against the custom as to the tithe of milk, and for the custom as to the loak-hen.

The tithes of milk decreed in kind. The bill as to firewood, honey, and apples, dismissed. The cross-bill as to tithe-milk dismissed.

The court therefore ordered the defendant to account for his tithe of milk with costs; that so much of the original bill as demands tithes of hearth-wood, honey, and apples, shall be dismissed with costs in equity; that so much of the cross-bill as relates to the tithe-milk, and the *modus* set up in lieu thereof,

shall be dismissed with costs at law and in equity; and that the *modus* of a loak-hen shall be established, with costs both at law and in equity, as to such part of the cross-bill as sets up the said *modus* of a loak-hen.

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The *modus* of the loak-hen established.

The deputy made his report, dated the 1st of *February* 1739; and upon reading the same, the court ordered it to be ratified and confirmed with costs.

And it was further ordered, that so much of the original bill as demands tithes of cattle used for the plough by the defendant on his farm be dismissed with costs.

H. 12 Geo. II. A. D. 1738. Scac.

Wallis v. Pain and Underhill. [Com. Rep. 633.]

A BILL was exhibited in the exchequer by the plaintiff, who was tenant or farmer under the impropiator of the great tithes in the parish of *Prittlewell* in the county of *Essex*, which stated that the defendant sowed a field with clover, which was cut for hay; that he let the aftermath grow for seed, which was cut and thrashed for seed, of which the plaintiff ought to have the tithe as a great tithe. The defendant *Pain* insisted, that he was farmer of a farm called *Milton-hall*, and that there was a *modus* to pay 2d. an acre and ten bushels of wheat to the vicar in lieu of all small tithes; that he had paid to the plaintiff for the tithe-hay of his clover, and that the aftermath of clover sowed for seed, and was thrashed for seed, which was a small tithe, and payable to the vicar; and Mr. *Underhill*, the vicar, insisted upon the tithe of clover-seed, as a vicarial or small tithe (b).

Tithe for clover and grass seed due to vicar, as being a small tithe. Bunb. 344. pl. 424.

And

(b) The state of this case appears from the Decree-book to be as follows:—The bill stated, that *J. Briflow* and another being seised in fee-simple, and entitled to the rectory impropriate of *Prittlewell* in the county of *Essex*, and to the great tithes arising in the said parish, demised the same to the plaintiff for twenty-one years; and that, for several years before the said lease, the plaintiff was tenant at will of the said great tithes, and received the same in kind, except when the same were compounded for; that by virtue of the said lease, he had collected all great tithes in kind or by composition, except for two years, when the defendant occupied several acres of land, and grew clover thereon, which he cut and made into hay, and also had clover-seed and rape-seed; that the tithe of clover hay, and clover and rape seeds were great tithes; and that the defendant ought to have compounded for the same, or to have paid them in kind, but which he had refused, under some pretences, to do. The bill therefore prayed an account of the same, and that the defendant might satisfy the plaintiff for the tithes thereof.

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And by the depositions of several witnesses it appeared, that the difference between clover cut for hay, and that cut for seed, was considerable; that when made into hay, it was cut while the grass was green, and fit for cattle to eat; that when cut for seed, it stood till the stalk was sear and good for nothing, but was thrown out for stover or fodder, and the seed was the only thing of value, or regarded; and that the tithe of clover-seed had been always paid to the vicar in that parish, and looked upon as small tithe; that the impropiator had never received it but once, about five years ago, when the plaintiff took it from a woman in the parish;

The defendant *Payne* admitted, that in the said years he had occupied a farm, called *Milton Hall*; and he set forth the quantities of his tithable matters thereon, and insisted, that no tithes were due for clover seed; for that he had no clover hay in the year 1735; and that in 1736 the plaintiff had received his tithe in kind of the same; and that the aftermath being preserved for seed was in the same year cut and thrashed for seed, for which no tithe was due. He denied that clover seed, rape seed, or the aftermath of clover was a great tithe; but insisted, that they were small tithes, and payable to the vicar; and therefore as he had paid the vicar his composition for the same, he was not answerable to the plaintiff for the tithes either of clover seed, rape seed, or the aftermath or second cutting of clover grass. The defendant also insisted, that there had always been an immemorial custom in the said parish for the owners or occupiers of *Milton Hall Farm* to pay four seam of wheat and 40s. to the vicar, in lieu of all small tithes, and to take ten acres of hard corn and ten acres of soft corn tithe free; and that he had paid the said composition to the vicar for the said years.

The plaintiff replied specially to *Payne's* answer, and thereby waived his demand to the tithe of rape seed.

The defendant rejoined; and witnesses were examined on both sides; and the cause came on the 22d of *February* 1737; when it was ordered to stand over on payment of 5l. costs of the day, to make the vicar a party thereto. The bill being amended accordingly; the defendant *Underhill* the vicar, admitting that the great tithes were due in kind to the impropiators or their tenants for such lands as were chargeable therewith, said, that the defendant *Payne* held *Milton Hall Farm*, and that he believed there was such a custom as stated in his answer. He insisted, that the tithe of clover seed was a vicarial tithe, and that for thirty years past he had, as vicar, received the tithe of clover grass when cut for seed; and that the said tithe had always been paid to him, as vicar, until the plaintiff interrupted him; and he insisted, that the tithes, as well of clover as clover seed and rape seed, were vicarial or small tithes, especially if produced after mowing the clover grass growing in the same year (if cut for seed), and of the second math (if cut for seed), when the tithe of the first cutting of such clover had been paid in the same year in kind, if cut for hay.

The plaintiff replied specially to this answer, and thereby waived his demand to the tithe of rape seed.

The defendant rejoined, and witnesses were examined on both sides; and now upon hearing counsel on both sides, and reading the proofs, and on full debate; the court was opinion, that the tithe of clover seed is a small tithe, and belongs to the vicar of the parish; and therefore ordered, that the bill be dismissed with costs.

but

but for twenty or thirty years the defendant had received it as small tithes, and fifty years ago it had been paid to or for the vicar; indeed the vicar, Mr. *Underhill*, for the greater part of the time he has been vicar, held the great tithes likewise.

It was argued by Mr. *Bunbury* and Mr. *Boote*, that clover-seed is in the nature of a great tithe, and due to the plaintiff; for as tithe-hay is due to him, the seed of that hay must, of consequence, belong to him too; that where the parson is entitled to tithe-hay, he will be entitled to the hay made of clover, as well as of other grafs; and if to the hay, likewise to the seed.

It was agreed, that they could not find that any case had been in court, wherein it was determined, that clover-seed was a great tithe, or that it did not belong to those who had the tithe of hay; but two cases were mentioned, one from Ch. Ba. *Dod's* note, which was the case of *Stanford* and *Hughes*, as cited in the case of *Peacock* and *Cole*, *Hil.* 1694, in these words: "Arable land pays tithe to the impropiator in kind, saintfoin was sown upon the land, and sowed to seed, and the profit was in the seed, and not in the stalk; there was a custom of 2 d. an acre for hay, payable to the vicar; and it was resolved, that notwithstanding the stalk and seed was in the nature of corn, yet it should be looked on as grafs, and payable accordingly."

The other case was from Mr. *Brown's* notes, in these words: "It was decreed, that the aftermath of clover grafs is tithable, unless a *modus* can be proved, 3 *Jac.* 2. *Brook* and *Hall*;" and *Hall* and *Babb* was cited, *Trin.* 1683.

In this case the lord chief baron cited the case of *Pomfret*, parson of *Luton*, in *Bedfordshire*, that the tithes of saintfoin should be paid as grafs, and not as grain, though there was proof of thrashing it, and feeding hogs with it, and making bread with it, and the vicar then had it. Supra 530.

This case of *Pomfret* against *Laundy* and *Waite* is found *Trin.* 32 *Car.* 2. fol. 227. wherein *Laundy* insisted, that saintfoin thrashed was looked upon as grain, and sown and often thrashed as grain, and that the tithe belonged to the impropiator, and not the vicar. As to this defendant, the case was to be farther heard at the setting down of causes that term, when the court would further consider, whether he should pay tithe of saintfoin to the impropiator or the vicar, but no such decree can be found; and as to the other defendant *Waite*, the question was determined on stat. 31 *H.* 8. c. 13.

Now

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Now by these cases it appears, that it was thought reasonable the stalk and seed should go together, and consequently, when the impropiator is entitled to the stalk, as he is when made into hay, he ought likewise to have the seed.

And it would be very inconvenient if it was otherwise; for the owner might shift his tithe to the parson or vicar as he pleased; for when it is first cut, it is fit to be made into hay, the tithe whereof will belong to the parson; but, if he let it stand to dry, that the seed may be ripened and fit to thrash, then the tithe will belong to the vicar; and when shall it be said to be dry enough for the vicar? When it is first cut, the tithe ought to be set out, and the parson will have it; but after a while the vicar will claim it, although it was before vested in the parson.

On the other side it was insisted by Mr. *Floyer*, Mr. *Wilbrabant*, and Mr. *Starkie*, that clover-seed is in its nature a small tithe; at least, it is a vicarial tithe, due to the vicar in the present case; that there is not one case in point against it; and tithe of no seed was ever looked on as a great tithe. It is said, that the stalk and seed shall go together; but it is frequent, that the seed or fruit of trees go to the vicar, when the tree goes to the parson. Wood is always reckoned a great tithe, and goes to the rector, unless the vicar be specially endowed with it; but acorns, as well as the fruits of all other trees, were always held as a small tithe.

But, if the matter were doubtful, in this case it appears it has always been paid to the vicar for thirty, forty, or fifty years, so that there is no pretence in this case to say it does not belong to the vicar.

But as it was a new case, the court took time to consider of it; and afterwards in the same term, the lord chief baron *Comyns* delivered their opinion as follows, *viz.*

As this was a matter which might be considerable in its consequences in relation to the quiet of poor vicars, I considered two points:

1st, Whether clover-seed was in its nature a small tithe, so that it would belong to the vicar, who was endowed *de minutis decimis*?

2dly, Whether, if that was in any respect doubtful, it would not belong to the vicar, under the circumstances of the present case?

And the chief baron was of opinion, that clover-seed was in its nature a small tithe. By the constitution of *Robert Winchelsea*, archbishop of *Canterbury*, a uniform payment of tithes was established

blished in the province of Canterbury, "*Volumus quòd decimæ de frugib. (non deduct' expen') integrè & sine diminutione solvantur, & de fructibus arborum, de seminibus omnibus, de herbis hortor', nisi parochiani fecerint redemption' pro talibus decimis.*" Where a manifest distinction is made between tithes *de frugibus*, and tithes *de fructibus, seminibus, & herbis hortor'*. And Lindwood saith, fol. 188. *de decimis*, that tithes *de frugibus*, strictly taken, mean those only *quæ solent ligari*; but in a larger sense they comprehend not only tithes *de frumentis & leguminibus, verum etiam de vino, silvis cædis, cretâ, fœdinis, & lapicidinis*, that is, all such as commonly are reputed great tithes.

But, speaking of tithes *de seminibus omnibus*, he saith, fol. 192. *de decimis*, that they comprehend all seeds, *sive in campis, sive in hortis, utpote lini, milii, canabi, grani porrorum, ceparum, hyssopi, saulium, petrocilini, rapi, lactucæ, & aliar' herbarum*.

And upon the words making redemption *pro talibus decimis*, he saith, tithes *de fructibus, seminib' & herbis, quæ revera decimæ int' minutas computantur*; sunt enim decimæ minutæ quæ proveniunt de milio, menthâ, anetho & similibus; and he takes notice that Hortiensis says, "*quod in Angliâ consistunt minutæ decimæ in lanâ, lino, lacte, caseis & agnis, in partu animalium, pullis, ovis, & decimis hortor'*; decimæ etiam mellis & ceræ numerantur inter minutas.

So that by common law, as long as the distinction has been made between great and small tithes, which is as ancient as appropriations to religious houses, who usually engrossed the great, but left the small tithes to the curate, all seeds have been reckoned as small tithes.

The common law seems to follow the canon law in this point. 2 Inst. 649, Coke, speaking of tithes, saith, *quædam sunt majores, ut frument', zizania, fœnum, & quædam minores sive minutæ, quæ proveniunt ex menthâ, anetho, olerib' & similibus*.

And all the resolutions relating to tithes, which proceed from things newly introduced into England, have held them to be small tithes. It was so resolved, Pasch. 38 Eliz. Bedingfield and Feake, supra 166. Cro. Eliz. 467. Moore 909. 2 Rol. Abr. 310. 335. Owen 74. Goldf. 149.

And in case the vicar sues the impropiator for the tithes of saffron in the ecclesiastical court, no prohibition shall go. 2 Ro. Abr. 310. So, if the field was formerly sowed with corn, and after is sown with saffron, the tithes shall be paid to the vicar; for by Popham, the tithe of saffron heads are small tithes; and

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though the tithes of the field have been paid to the parson, yet when converted to another use, whereof no grass tithes come, the vicar shall have the tithes. *Owen* 74.

So, *Sir Richard Uvedale* against *Tindale*. *Hutt.* 77. *Cri. Car.* 78. the question was on a special verdict, if woad was a small tithe or great? and it was unanimously agreed that woad was a small tithe; for if no circumstances be to difference the case, hemp, line, saffron, hops, tobacco, and all such new things shall be *minutæ decimæ*.

So, *1 Sid.* 447. where a prohibition was prayed to a suit by a vicar for tithe of woad, suggesting it to be a great tithe, the court doubted, because it is reckoned, as the book says, *inter minutæ decimas*, as hops, &c.

So, *1 Sid.* 443. on motion for prohibition to a suit for tithe of hops, it was said hops, woad, and such small things of new invention, are *minutæ decimæ*.

So, in *Pal.* 219. *Ward* and *Britton*, the question was, whether lamb was a small or a great tithe? *Bridgman* chief justice said, *minutæ decimæ* comprehended only tithe of gardens, hemp, hops, saffron, &c.

So, in *1 Vent.* 61. it is said, hops are of the nature of small tithes.

So, flax was resolved by three justices to be a small tithe: *Wharton* and *Lisle*, 3 *Lev.* 365. 4 *Mod.* 184. *Cartb.* 263. *Skin.* 341. 356. So it was held in *Noah Webb's* case, 14 *Car.* 1 *Rol.* 643. *f.* 3.

It is true, some opinions have been, that small tithes must be estimated, not from the nature of the thing tithable, but from the quantity of the tithes; and therefore it was said in *Uvedale* and *Tindal's* case, if all the profits of a parish consist in such things, hemp, hops, wool, lambs, &c. may be great tithes. So in *Cal. Ju. Eccl.* 691. it is said hops in gardens are small, in the fields great tithes; and in the case of *Wharton* and *Lisle*, *Holt* chief justice at first seemed of opinion, that tithes must take the denomination of small or great from the quantity of the crop growing; but the three other justices held strongly, that tithes were great or small from the nature of the things which yielded the tithes; and *Holt* yielded to it so far, that he absented himself when judgment was given; which he would scarce have done, if he had been fixed in the contrary opinion.

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And this seems the better opinion; for it gives foundation for continual debate, what shall be a quantity too large for small tithes. If it be said what grows in a garden, some gardens are not half an acre, others two or three acres; gardens are enlarged now-a-days to fifty or one hundred.

Perhaps that may be a proper distinction as to peas, beans, or other pulse, because they had existence in former times, and appropriations were made *de bladis & leguminibus* to religious houses; but as to things newly introduced into *England*, there is but little reason that the patentees, who claim only what came to the crown upon the dissolution of monasteries, should have tithe of those things which were never appropriated, and to which the religious houses dissolved never had title.

As to clover-seed, there does not appear any express determination in this court, that it is in its own nature a small tithe. It is a seed, and all seeds are mentioned as a small tithe; and no instance appears that ever any seed was held to be a great tithe. It is a seed newly introduced, and therefore there is reason to look upon it to be of the nature of those things of a new invention, which, by the cases cited, have always been holden as minute tithes.

It is true, that clover grass made into hay is of the nature of all other grass made into hay, and, consequently, must belong to the parson, or other person, who is entitled to tithe-hay; but it does not follow, when it stands for seed, and is made into hay, that the seed may not be small tithes. Wood is a great tithe, but acorns, mast, &c. are small tithes. Rape-seed, carraway-seed, turnip-seed, mustard-seed, are small tithes; but, if the herb be growing with other grass, and made into hay, it would be a great tithe. Vetches are a great tithe if mowed or cut when ripe; but, if cut green for cattle, they are small tithes.

So, apples and other fruits are confessedly small tithes: but the wood of apple-trees, and other fruit trees, if cut in a year when no tithe is paid of the fruit, is, as other wood for firing, a great tithe; but in the year when tithe is paid of the fruit, if then felled, no tithe shall be paid of the wood, the fruit being looked on as the principal.

And this may answer an objection, that it would be in the power of the occupier to make it a great or small tithe, and so favour the parson or vicar as he pleased, by cutting it for hay, or letting it stand for seed; it may as well be said a man may sell his

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The cases mentioned from Mr. *Dod's* and Mr. *Brown's* notes are imperfect hints of those cases; I obtained a note of them from Ch. Ba. *Ward's* notes, which is thus:

Pasch. 1680, *Woodford* and *Standfast*, the question was, whether clover should pay tithe as hay, and should be within a *modus* of 2d. an acre for all meadow and mowing ground when clover stands for seed, and a great quantity is produced. Note; the court was divided; *Montague* chief baron and *Atkyns*, that it should be accounted hay; *Raymond* before his removal, and *Gregory*, to the contrary, and after *Weston* inclined it was not within the custom; but the plaintiff the day after the term prayed to dismiss his bill without costs or prejudice; which was admitted.

Pomfret and *Launder Wait & al'*, 8th July 1680, tithes of clover grass thrashed and made into horse bread, and hogs fed with the seed, yet adjudged to be hay and tithable to the vicar who was endowed with hay, and not the impropriator, as a new and different tithe from hay.

In these cases it appears, that the dispute was between the impropriator and the vicar who was endowed with tithe of hay, for the seed of *saintfoin* or clover; (for in that the reports differ;) the impropriator insisted it was of the nature of corn or grain, and consequently belonged to him.

In the first case the court was divided; in the second it inclined, that the seed belonged to the vicar; so that, as far as the authority of these cases goes, the tithe of the seed was decreed to the vicar. It is true the vicar was endowed of the tithe of hay; and the expression of some of the judges was, that the seed should go with the stalk, and should be looked upon as hay or grass; but such expressions might well be used in favour of the vicar, who was entitled to tithe-hay, in opposition to the impropriator's claim, who would have it taken to be of the nature of corn, because horse bread was made of it, and hogs fed with it. And therefore it would be too rigid a construction of those expressions to say they imported, that the seed should in all cases be reputed of the nature of grass or hay, since they are apparently different; although in these particular instances, where the vicar had tithe-hay, they may be resembled to it, since one as well as the other belonged to him. The whole authority of these cases results to this; that *saintfoin* or clover-seed is not of the nature of corn or grain; in the first of which cases the

court

court being divided, the plaintiff, finding the inclination of the court, desired to discontinue his bill without costs; which was admitted: in the second case, it appears not what determination was finally made, nor does it appear, what became of it in the entry of the deputy remembrancer; whether it was properly a great or a small tithe was not at all under the consideration of the court; and by the case before cited it seems most reasonable to account it of the nature of a small tithe.

But in the present case it seems most evident it shall be so taken, since by the depositions in the cause it appears, that, for forty or fifty years in this parish, the vicars have received the tithe of this seed; and although the impropriator hath frequently hired the vicarial tithes, yet it was rarely, if ever, taken by him when he did not hold both.

The court decreed, that the seed of the second cutting of clover was a small tithe: the lord chief baron *Comyns*, baron *Carter*, and baron *Thomson*, were of this opinion; but baron *Parker* seemed to doubt the seed of clover being of the nature of small tithe (*c*); thought it a great tithe, as it partook of the nature of the stalk from whence it was taken, and because of the expression in the cases cited, that the seed and stalk should go together. And this opinion *Bunbury* thinks the best. But notwithstanding the authority of the case of *Pomfret* against *Lauder*, and the reason of the thing, judgment was given as above.

Bunb. 344.
pl. 424.

Com. Rep.
642.
Bunb. 344.
pl. 424.

But all the barons agreed in opinion, that the plaintiff's bill should be dismissed with costs.

Com. Rep.
642.

P. 12 Geo. II. A. D. 1739. Scac.

The Aldermen and Burgesses of *Bury St. Edmunds*, and *Lawrence Wright*, v. *Lewis Evans*. [Com. Rep. 643.]

A BILL for small tithes was brought by the plaintiffs, setting forth, that king *Jac. 1.* was seized in fee of the rectories and vicarages impropriate of the parishes of *St. Mary* and *St. James* in *St. Edmunds Bury* in the county of *Suffolk*, and of all the tithes great and small belonging to the said rectories and vicarages, formerly part of the possessions of the monastery of *Bury St. Edmunds* in the county of *Suffolk*; that being so seized, by letters patent dated 1st July 1 *Jac. 1.* the king granted to the aldermen and bur-

Prescription
in non deci-
mundo a-
gainst a
lay impro-
priator, held
not good.
Bunb. 345.
2 Eq. Cas.
abr. 734.
S. C.

(*c*) *Parker* afterwards, when chief baron, declared, that he had been since satisfied, that there was no ground for his doubt.—I mention this upon high authority.

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gesles of *Bury St. Edmunds* and their successors (*inter al'*) *decimas tritici, garbar' lanæ, vitular' &c. & omnes & omnimodas decimas dict' monasterio spectan'* tam majores quam minores.

And afterwards by letters patent dated 17th September 12 Jac. 1. the king granted to the said aldermen and burgesses and their heirs and successors (*inter al'*) the rectories of *St. Mary* and *St. James*, and the vicarages of the same churches, the advowsons, rights of patronage, &c. *ac omnes & omnimod' decimas tam majores quam minores prædial', mixtas, & minutas*, to the said churches, &c. *dicto monasterio spectan'*: That by indenture, 2d of April 1724, the aldermen and burgesses of *Bury* made a lease to the other plaintiff *Wright*, of all their tithes of corn and grain arising within the said town of *Bury* in the said parishes of *St. Mary* and *St. James* for the term of eleven years. And afterwards, taking notice that by the said lease the tithes of corn and grain only were demised, and the small tithes in the said parishes by mistake were omitted, although they were intended to have been leased, and the plaintiff *Wright* the lessee ought in conscience to enjoy them; it was, by an order of council, entered in the council-book of the corporation, agreed that a bill should be exhibited in the name of the corporation, or *Wright*, or both, for the recovery of the said small tithes, due from the defendant and others for lands by them held in the said parishes, and on such recovery satisfaction should be made for the same to the plaintiff *Wright*: That the defendant *Lewis Evans*, from the year 1724 to the year 1734, held several lands within the said parishes in the town of *Bury*, particularly one hundred and eighty-four acres, part of a farm called *Eldo Farm*, or *The Old Farm*, which farm for the greatest part lay in the parish of *Ruffham*, and only one hundred and eighty-four acres, part of it, lay in the parish of *St. Mary*, which farm was parcel of the possessions belonging to the monastery of *Bury St. Edmunds* in the county of *Suffolk*; that the defendant *Evans* likewise held in the said parish of *St. Mary* during the said years several lands called *Wood Went* containing about ninety-four acres, and other lands containing about thirty-six acres, and other lands about nine acres, on which were arising yearly great quantities of corn, hay, clover-seed, turnips, and other small tithes; whereby the said aldermen and burgesses, or the said *Wright*, became entitled to demand the said tithes; and the bill therefore prayed that the defendant might shew cause, why he should not make satisfaction for the same to the said *Wright*; the said aldermen and burgesses

consenting

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consenting he should receive the same; and that the plaintiffs might have such relief in the premises as the nature of their case in equity and good conscience might require.

To this bill the defendant answers, and admits, that he hath holden several lands in the bill during the time charged, particularly one hundred and eighty-four acres, parcel of *Eldo Farm* or *Old Farm*, which was part of the possessions belonging to the monastery of *Bury St. Edmunds*, and the lands called *The Wood Went*, and the said thirty-six acres and nine acres in the parish of *St. Mary*, and believes the several kinds of tithes and quantities mentioned in the bill might be arising in the said several years, but insists, that he hath paid and satisfied to the plaintiff *Wright* for all the tithes of corn and grain growing in the said years, but that no small tithes were ever paid or demanded for the said lands; and further insists, that as no small tithes, or any satisfaction or composition for the same, were ever paid by or demanded from the defendant, or any person under whom he claims, in respect of the said lands, or from any other owners or occupiers of lands in the said town of *Bury*, after such length of time and so long enjoyment of lands freed and discharged from small tithes, a legal discharge is to be presumed; and it must be necessarily intended that the small tithes by due course of law were aliened or released to the owners of the said land, by the persons entitled to the inheritance of the said small tithes, though the conveyance or release, or other legal discharge, be lost or destroyed, especially since the small tithes in the said parish of *St. Mary* are of equal value with the great tithes arising there.

This case coming on to be heard on *Thursday* 17th of *May* 1739, the plaintiff produced the said letters patent 6 & 12 *Jac.* the lease and order of council, and by depositions of *Charles Woodward* and *Francis Wright* (all which were read) proved that forty or fifty years since they held lands for many years in *Bury*, or collected the tithes there, and small tithes were paid by several persons in the said parish of *St. Mary* and *St. James*; and they had heard their fathers (who held land forty years there before their having lands there) and one *Richard Coffy* deceased, declare that small tithes in the said parish ought to be paid or compounded for.

On the part of the defendant it was proved by the depositions of several witnesses, that forty-eight or fifty years before they gathered corn in the said parish, and never knew the small tithes paid or demanded.

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On this case it was insisted by Mr. *Bestle* and Mr. *Starkey* of counsel with the defendant, that the bill was not proper which demands satisfaction for small tithes from the plaintiff *Wright* who had no lease of or title to them. *Sed non allocatur*; for the plaintiffs shew the title of the corporation to great and small tithes, the lease of the great tithes to the plaintiff *Wright*, and their intention he should have the small tithes, and then concludes, that the corporation, or he, is entitled to such small tithes; and prays that the defendant may shew cause why he should not make satisfaction to him for the small tithes arising in his lands, the corporation consenting he should have them; and they pray general relief as the nature of the case requires, so that the court may, consistently with the prayer of the bill, direct the defendant to account to the plaintiff *Wright* for his great tithes not satisfied, and to account to the corporation for the small tithes, which were not comprehended in the lease to him, and to which therefore the corporation continues entitled, notwithstanding it is prayed that the defendant should shew cause why he should not make satisfaction for them to *Wright*, they consenting he should have that satisfaction.

Then it was insisted by the counsel for the defendant, that since there was no proof of any small tithes being ever paid by the defendant (although it was proved by *Richard Micklefield* that 2s. had been demanded *per acre* for the small tithes of the lands he held, part of *Eldo* or *Old Farm*, and he offered 18d. an acre, but afterwards refused to pay it); and it was proved by several witnesses that they never knew small tithes paid for, and that the small tithes were more in value than the great tithes in the parish; it was insisted, That in the case of a lay impropriator, the defendant might say, in bar of the demand of tithes, that no tithes had ever been paid, or demanded for these lands.

It is true, in the case of a rector or spiritual person no one can prescribe against him in a *non decimando*; but otherwise it is in the case of a lay impropriator.

And the reason given in the bishop of *Winchester's* case, 2 Co. 44. that if such a prescription should hold in the case of a spiritual person, a jury of lay gentlemen would not be equal to the trial of such prescription, fails in the case of lay impropriators.

And although there was no express determination in the point by this court, yet many judges were of that opinion. In the case of *Benson* and *Olive* in this court, where the bill was by a lay impropriator, the chief baron and another baron were of that opinion; indeed

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indeed when it was spoken to in 1727 and 1730, the court was divided in opinion, and so no decree was made. 1739.

In the case of *Meadly and Tomlins, Pasch. 7 W. 3.* the bill was by a lessee of the dean and canons of *Windsor*; and in the case of *Talbot against Samon, Harding & al.*, 1736, the plaintiff was a lessee of the bishop of *Litchfield and Coventry*, the court determined not the matter by allowing the prescription alleged, because they were in effect ecclesiastical persons, being lessees for years to such as were spiritual persons.

And in this case, though there was proof of payment of small tithes by the inhabitants of *St. Mary*, yet none were paid by the defendant; one witness indeed said, he promised to pay for the tithes of clover-seed; but he might apprehend that to be a great tithe before the determination of the court in the case of *Wallis and Pain*; and though the one offered to pay 1 s. 6 d. in the pound and 2 s. was insisted on, upon better thought afterward, he refused to pay it.

And the court being earnestly desired to consider the case, and it being a matter which might frequently come before the court, they took time to think of it till next term; and in *Trinity* term the chief baron delivered the opinion of the court to the effect following:

The matter for the determination of the court may be considered under two heads:

First, Whether a lay-man can prescribe in a *non decimando* against a lay impropiator?

Secondly, Whether the defendant hath made out a case which may entitle him to the benefit of such a prescription?

And in both these points the opinion of the court was for the plaintiff.

As to the first question, they think there is no foundation for such a distinction, that the defendant may prescribe against a lay impropiator any more than against an ecclesiastical person; which it is admitted he cannot. For,

First, No such distinction appears in any law book whatsoever; the rule is laid down generally, that a layman cannot prescribe in a *non decimando*, but in *modo decimandi* he may; this is said by *Choke*, so long ago as 8 *Ed. 4.* 14. this is expressly resolved in the bishop of *Winchester's* case, 2 *Co. 44.* 1 *Rol. Abr.* 653. The same is agreed in several other cases. *Wright against Gerrard. Hob.* Supra.

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306. *Moore* 425. 2 *Keb.* 28. 60. And in *Slade and Drake, Hob.* 297. it is largely descanted upon, and agreed by lord chief justice *Hobart* to be a settled principle of law.

So, *Seld. de decimis, c. 13. f. 2. 3 vol. f. 1279.* who was not thought averse to the privileges of laymen in the enjoyment of tithes, after an account given of the infeodations of tithes to laymen, which, by the laws of *France* and *Spain*, were still allowed, concludes, that infeodations were in *England* as in other states, but of latter times none are allowable derived from other original than the statute of dissolutions; that discharge by prescription of paying no tithes, or any other thing in lieu of them by later canon law, since the parochial right established, is allowed only to spiritual persons, but to no layman, the laity being incapable of tithes by pernancy; as also, of discharge by bare prescription, saving in cases within the statute 31 *H. 8. c. 13.*

And the reason given in the books, why a layman cannot prescribe in a *non decimando*, is, because a layman, since the parochial right established, is incapable of tithes in pernancy. So saith lord *Coke*, 2 *Co.* 44. as well as *Mr. Selden supra*; and, consequently, as he cannot take a grant of tithes to himself, unless upon a consideration paid for them as upon a real composition by parson, patron, and ordinary, or by a *modus* given in lieu and satisfaction, so he cannot be discharged from the payment of them; for a real composition shall not be intended unless it be shewn.

It has indeed been objected, that there is no foundation for a layman to be excluded from the benefit of such a prescription, since there is no incapacity in him to take such a grant; and therefore it is hard that time, which establishes a right in other cases, shall weaken his right in respect to his discharge from the payment of tithes, and, consequently, that he shall have no advantage from a real composition, unless he can produce it, which in length of time may, as well as other grants, be lost; and yet in other cases where there has been an immemorial usage to pay or be exempt, some grant shall be presumed originally made to warrant it.

But this will not appear altogether so hard, if it be considered, that when the parochial right became established, and tithes were the fixed and settled revenue of spiritual persons only, a grant of them to any other person was void, unless made upon a valuable consideration, so that there was *quid pro quo*; as was the case of a real composition or *modus decimandi*. It was void, not from any incapacity

capacity in the grantee to take, but from the impropriety of the thing granted, which being appropriated to spiritual persons, as their proper and peculiar maintenance, could not be given to a layman. That this was so, appears by an epistle of pope *Innocent* the third, in the body of the canon law, *lib. 3. tit. 30. ca. 29. de Dec.* where it is said “*Perceptio decimarum ad ecclesias parochiales de jure communi pertinet*,” and *Lindwood*, speaking of portions of tithes which a person might prescribe to have in the parish of another, saith, *Portiones potuerunt pervenisse ad locum religiosum de concessione laici, &c. de decimis vel proventus quos laicus talis habuit ab ecclesiâ aliâ in feudum ab antiquo: hoc verum est, si tales portiones decimarum eis donatæ fuerunt ante consilium Lateran’ celebrat. anno 1130 temp. Alex. 3. Nam ante illud concilium potuerunt laici decimas in feudum retinere, non tamen post tempus dicti concilii.*

And the canon law of that council runs, *Prohibemus ne laici decimas cum animarum periculo detinentes, in alios laicos possint transferre: si quis vero receperit, et ecclesiæ non reddiderit, Christianâ sepulturâ privetur.* Cod. 691.

Hence it is manifest, that it was not thought a layman was incapacitated to be the pernor of tithes from any incapacity in his person, but from the nature of the thing granted, which being esteemed in those days as the peculiar revenue of the church, and laymen being under so severe penalties prohibited to hold them, it is no wonder the common law, which in many instances admitted the authority of the canon law in those times, should hold the pernancy of them by a layman as unlawful.

But, since a layman may claim an exemption from payment of tithes by real composition as well as by a *modus*, why should not he prescribe to the exemption as well in one case as the other? there is a plain difference; for when he prescribes in *modo decimandi*, the compensation to the parson manifestly appears in the prescription; and if no advantage to the parson appears, the *modus* is not good; but, if a man should be allowed to prescribe in a *non decimando*, without shewing any consideration at all, it would be liable to great abuse; and it is not so great a hardship for a temporal person to keep the instrument of his real composition, when he knows it necessary he should do so, as it would be mischievous to the clergy, if that was not requisite; for a composition by a parson and a successor for some years, might soon give pretence to set up a prescriptive right.

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2dly, Another reason, why a layman should not prescribe against a lay impropiator any more than against an ecclesiastical person, is, because a lay impropiator must claim under a spiritual or ecclesiastical person; for every patentee of the crown, who can lay claim to tithes, must claim them by virtue of the statute 31 *H. 8.* c. 13. or other statute for the dissolution of religious houses.

The statute 31 *H. 8.* is the first act of parliament which enacted that the king and all persons who should have any manors, lands, &c. belonging to the religious houses thereby dissolved, should hold and enjoy the same freed and discharged from the payment of tithes, in as full and ample a manner, as the abbots, &c. had the same at the time of the dissolution.

Now it is well known, that none of those religious persons could be exempted from the payment of tithes, but by order, the pope's bull, composition real, prescription, or unity of possession; and every patentee of the crown, that is, every lay impropiator, must allege a title to the tithes he demands by grant from the crown of some rectory, vicarage, or other tithes, which were part of the possession of some religious house, which came to the crown by that or some other statute; and therefore, as Lord *Hobart* lays in *Slade* and *Drake's* case, f. 296. if a temporal person succeeds a spiritual person in discharge (and it is the same in perception of tithes) it is to be reckoned in a spiritual person, and not in a temporal; and, consequently, a man who could not prescribe against an ecclesiastical person, cannot any more prescribe against a patentee, who derives his title from and under him, and is in the nature of his representative.

As to the authorities in the case, it is agreed, that there has not been any determination against the plaintiff; the case of *Benjon* and *Olive* was rather in favour of the plaintiff; for though the court was divided upon the circumstances of the case about making a decree, or leaving him to law, the plaintiff brought his action on the statute 2 & 3 *Edw. 6.* c. 13. which was tried before chief justice *Raymond*, and recovered; and the other two cases mentioned, *Meadly* and *Tomlins*, *Pasch. 7 W. 3.* and *Talbot* and *Salmon*, 1736, seem authorities for the plaintiff; for there the lessee of the dean and canons of *Windsor*, and the lessee of the bishop of *Coventry* and *Litchfield* (though laymen) had decrees for the tithes, although a constant non-payment was insisted on. And what difference can there be in the reason of the thing, between a lay lessee

lessee and a lay impropiator, if the prescription is allowable only, because he is a layman, and not an ecclesiastical person ?

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There are two cases, of which my brother *Parker* hath given himself the trouble to get copies ; they may be fit to be considered on this question.

The first is the case of *Medly and Talmy, Pasch. 7 W. 3.* where- in the plaintiff, as lessee of the rectory of *Leominster* in the county of *Suffex*, exhibited his bill against the defendant for title of corn and grain growing on his land in the said parish, and suggested that the defendant pretending his lands were exempted from the payment of tithes, refused to discover how they were so discharged. The defendant, by his answer, insisted, that his father in the year 1652 purchased the lands in defendant's occupation of one *William Cooper* of *Maidstone* in *Kent*, which in the purchase deeds were mentioned to be free from the payment of tithes, and conveyed as such ; but the ancient deeds were lost or mislaid, so that he could not set forth by what ways or means they were exempt. The cause coming to be heard before chief baron *Ward* and judge *Litt. Powis*, then a baron, on reading the purchase deed 1652, and great debate, the court did not think fit to decree for the plaintiff without a trial ; and proposed that an action should be brought on the statute 2 *Edw. 6. c. 13.* which the plaintiff declining, the bill was dismissed, by consent, without costs.

Supra § 19.

It is probable that the defendant had a legal exemption, which the plaintiff was conscious of, but thought to take advantage of the loss of the defendant's deed, whereby he was disabled to make it out ; but the court, not favouring his design, chose to dismiss his bill without costs.

The second case brother *Parker* hath copied out, was the mayor, aldermen, and burgesses of *Warwick*, against *Lucas, Trin. 9 Anne*, and heard 5th July 1710. The plaintiffs sued as impropiators of the rectory of *St. Mary* in *Warwick* for the tithes of two closes called the *Upper Fryers* ; the defendant admitted the plaintiffs entitled to the rectorial tithes in the parish, except of those two closes, which he insisted were the site of the mansion-house of the late dissolved friers preachers in the town of *Warwick*, which came to the crown by the dissolution of the said house, and were freed from the payment of tithes by virtue of some prescription, bull, order, or other lawful means, and had ever since been holden free from payment of tithes to the rector or vicar ; and that the monasteries, being a spiritual corporation, were capable of being discharged

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In these two cases it does not indeed appear directly, whether the defendants could make out a legal discharge, or not ; it was probable that they could ; and the plaintiffs thought it so probable, that they cared not to try that point, but consented that the bills should be dismissed ; but they are far from shewing the opinion of the court, that a bare prescription could be set up against a lay impropriator, any more than an ecclesiastical person ; for, if so, the bills ought to have been dismissed with costs without more ado. But, as where an ecclesiastical person sues, if the defendant has a probable ground of discharge, it is not proper to decree against it, without putting it into a way of examination, which the court seemed willing to do in these cases ; but the respective plaintiffs, doubtful of the issue, chose rather the bill should be dismissed.

But for the clear illustration of this point, it may not be improper to consider in what cases a defendant may be discharged by prescription, and in what not.

Where any man occupies lands which came to the crown by the dissolution of religious houses by virtue of the statute 31 H. 8. or statute 32 H. 8. it is manifest he may insist upon a discharge by prescription ; for since the religious houses dissolved by those statutes (being ecclesiastical bodies) were capable of a discharge by bull, order, or prescription, the patentees of any part of the possessions belonging to any of those houses are enabled by a special clause in the acts to enjoy the same acquitted and discharged of the payment of tithes, in as full and ample a manner, as the ecclesiastical person enjoyed them, at the time of such dissolution, &c. And by the statute 2 Ed. 6. c. 13. no person shall be compelled to pay tithes for any lands, &c. which by the laws and statutes of the realm, or by any privilege or prescription, are not chargeable with the payment of them.

Secondly, A spiritual person, or the king, who is *persona sacra*, being capable of tithes in pernaney, is capable of prescribing to be discharged of the payment of tithes.

That a spiritual or ecclesiastical person may so prescribe, is resolved in the bishop of *Winchester's* case, 2 Co. 44. *Cro. Eliz.* 511. so it is in *Richard* bishop of *Lincoln's* case, *Cro. Eliz.* 216. 1 Roll. 264. *Mo.* 435. 618. *Yelv.* 2. *Cro. Eliz.* 785. *W. Jon.* 368.

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That the king may likewise prescribe in a *non decimando*, appears, 22 *Aff.* 25. 10 *H.* 7. 18. *Mo.* 483. *Sti.* 137. *W. Jen.* 387. 1739.
Heil. 60. and in many other books.

But I know not that it has been allowed in any other cases.

It was insisted on in the case of *Sydowne and Holmes*, *Cro. Car.* *Supra* 479-422. *W. Jen.* 368. 1 *Roll. Abr.* 654.

The plaintiffs in prohibition surmised, that the prior of *Bredfall* was seized in fee of lands in his possession, and he and his predecessor time out of mind till the dissolution of the priory, by statute 27 *H.* 8. c. 20. held them discharged of the payment of tithes, and by patent the lands came to *Edward Battel* and to the plaintiff as his lessee, and it was insisted, that the prior being capable of tithes, and of being discharged by prescription, the plaintiff ought to have the benefit of the discharge. But by three judges it was resolved, that the prior, being capable of discharge by privilege, as well as by grant or composition, it shall not be intended to be a discharge by composition, but rather by privilege, which was the general course of exemption, which privilege was gone by the dissolution, and, consequently, the plaintiff ought to pay tithes; and a consultation was awarded. And *Rolle* said, it had been so resolved 7 *Car.* in the exchequer, and in another case 11 *Car.* by the same three judges.

The like resolution was in the case of *Wright against Gerrard*, *Supra.* *Hob.* 306. *W. Jen.* 2. where the plaintiff insisted upon a discharge by unity of possession of a farm called *Downball*, and of the rectory impropriate of the same parish, both which came to the crown by statute 27 *H.* 8. c. 20. and the plaintiff claimed the farm, as the impropriator did the rectory, by grant from the crown; but a consultation was granted.

The like resolution was in the case of *Bowles and Atkins*, 1 *Lev.* 185. 1 *Sid.* 320. 2 *Keb.* 28. 60. 472. where debt was brought on the statute 2 *Edw.* 6. c. 13. against the lessee of *All Souls* college, who insisted, that the prior of *Abingdon*, and his predecessors, held the lands time out of mind discharged of tithes till their alienation to the college of *All Souls*; but it was unanimously agreed by the whole court, that the college, being a temporal corporation, could not prescribe in a *non decimando*; and it was said in that case, that this point had been resolved in the case of *Sydowne and Holmes*, which was considered as good law in all the courts of *Westminster*.

There are many determinations in the matter in question, and much stronger than the present case, and it appears, that no difference was made between a lay impropriator and a spiritual person;
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for the ground and reason why such prescription is not good, is not in respect of the person against whom the prescription is alleged, but in respect of the person prescribing, because a layman is not capable so to prescribe, though an ecclesiastical person may. And this is confirmed by all those cases, where a *modus* is insisted on for the discharge of the tithe of hay, corn, &c. because it is spent for the fodder of their cattle, the maintenance of their families, &c. which was always disallowed, because it amounts to a prescription in a *non decimando*, *Mo.* 683. And such *modus* was disallowed for the same reason, as well where Sir *H. Walter*, a lay impropiator, libelled for the tithes, as where the parson of the parish sued for them; and after an argument at bar a consultation was granted, because none can prescribe in a *non decimando*, *Cro. Jac.* 47. and many cases might be cited to the same purpose.

Supra 486.

So, where the king prescribes to be discharged of the payment of tithe (as he may) his patentee, being a lay person, cannot do so, as was resolved 11 *Car.* where, in a prohibition, the plaintiff declared, that king *Edw.* 6. was seised in fee of the forest of *Savannah*, in the county of *Wilts*, and twenty acres of wood parcel of the same forest, and held the same time out of mind discharged of the payment of tithes, and granted them to the duke of *Somerset*, and by mesne conveyances the twenty acres of wood came to the plaintiff, whom the defendant sued for tithes. The defendant pleaded, that the twenty acres were not parcel of the forest, and afterwards by verdict it was found they were. But it was resolved, that the alienage of the king could not have advantage of this prescription in a *non decimando*, for a real composition or other consideration; for such discharge shall not be intended without shewing it specially, and then the grantee of the crown cannot be discharged; and in case the grantee of the king cannot prescribe in a *non decimando*, although he claims under the crown, which was exempted by prescription from the payment of tithes, it may be justly inferred, that he cannot do so in any other case; and that the law will not allow any person to prescribe in that manner, unless it be a person ecclesiastical or sacred, as the king is, who was enabled to hold tithes in perannuity, or unless he be within the exemption created by the statute 31 *H.* 8. or 32 *H.* 8.

By the words of the answer it looks as if some stress was laid upon the parish being exempt in this case; for the answer says, that no small tithes, or any satisfaction or composition for the same were ever paid by or demanded from the defendant or any under

under whom he claims, or from any other owners or occupiers of lands within the town of *Bury St. Edmunds*; but the counsel for the defendant did not insist upon this, nor indeed could they with any colour do so; for besides, that it appears by the depositions in the cause, that small tithes had been paid by several of the inhabitants there, it was resolved in the case, *Hickes and Woodescn*, *T. 6 W. & M. 4 Mo. 336. Carth. 392. Salk. 655. Skin. 560.* ^{1739.} that a custom to be exempt from the payment of tithes could not be alleged in a hundred, much less in a parish; but it must be in a county or in *parish*, such as the wild of *Kent*, and there only for things not due of common right, as for wood, &c. And therefore a custom alleged in the hundred of *Hunspill* to be free from tithes for the agistment of barren cattle, was, after a verdict for the plaintiff which found the custom, holden to be a void custom, and a consultation was awarded, which was a farther authority in confirmation of the general maxims of law, that a layman cannot prescribe in a *non decimando*. ^{Supra 550.}

Thirdly, Another reason may be given for the disallowing of the defence set up for the defendant in the present case, in that the defendant does not allege any particular ground of discharge, but only saith, that no small tithes were ever paid or demanded for his lands, and therefore after such length of time, and so long enjoyment of lands free from payment of tithes, a legal discharge must be presumed, and it must necessarily be intended that the small tithes were aliened or released to the owners of the land, by the persons entitled to the inheritance, though the conveyance, or release, or other legal discharge, be lost or destroyed.

I agree, that in courts of equity the same formality is not required as in pleadings at law; but the substance of the matter alleged for the exemption of the defendant ought to be shewn with so much certainty at least, as that the court may see what is insisted on, and direct the same to be tried or examined. In case a prescription is relied upon, the defendant ought to allege the prescription in such a manner as that it may be tried. In this case the defendant does not so much as say, he is excused by prescription: he says, indeed, no small tithes were ever paid or demanded, which may be evidence of a prescription; but in all cases where a prescriptive right is insisted on, that is the matter which must be tried; and can the court direct a trial of what is not alleged, or where that only is alleged that may be some proof of it, or whence it may be inferred? much less, whether any legal discharge generally, or whether any

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M. 13 & Tr. 14 Geo. II. A. D. 1739-40. Scac.

Gratwick v. Uttermare. [MSS.]

Where in a suit for an account of tithes, the defendant insists that the plaintiff is indebted to him in different sums of money upon other distinct accounts, the court will decree a general account merely upon the defendant's answer.

BILL by an executor of a rector for arrears of tithes. The defendant admitted, that he never accounted with the plaintiff's testator for his tithes, (for which he compounded with him at 8 l. a year) because the late rector was indebted to him in divers sums particularly mentioned in the answer, which amounted to more than the sum due for the value of the tithes; that the defendant had often pressed the rector in his lifetime, and the plaintiff since his decease, to come to an account, which was never done. The plaintiff replied; but no witnesses were examined on either side, so that the cause came to a hearing on bill, answer, and replication. It was objected for the plaintiff at the hearing, that no reference could be made to the deputy remembrancer to state any account as to the sums claimed by the defendant, because they did not relate to tithes, for which only the bill was brought, but related quite to a foreign matter; nor could the deputy remembrancer in taking the account as to the tithes make any allowance to the defendant for these sums; because the defendant ought to have exhibited a cross-bill, or at least ought to have examined witnesses, and proved his pretended debt before the hearing. But the court thinking it consonant to the rules of natural justice, decreed a mutual general account to be taken between the parties.

H. 14 Geo. II. A. D. 1740. In Canc.

The Archbishop of *York*, and Doctor *Hayter*, v. Sir *Miles Stapleton* and others. [2 Atk. 136.]

Bill by lessee of a rectory for three lives, who had made a derivative lease, for tithe in kind, and to establish a custom, of setting out corn in flocks, is properly brought, though the tithes are out in lease, as such a bill prevents collusion between the lessees and occupiers.

THE archbishop of *York* was entitled in right of the church to the rectory of *Milton* in *Yorkshire*; and in 1733 granted a lease for three lives to archdeacon *Hayter*, who made a derivative lease to one *Taylor*; and this bill is brought by the archbishop and doctor *Hayter* for an account of tithes in kind, and to establish the custom of setting out the corn in flocks or stacks.

It was objected, that there is no foundation for this bill, because doctor *Hayter*, having made a lease to *Taylor*, is not entitled to any account, and cannot maintain a bill to establish a custom of setting out the corn in flocks or stacks, which is a mere right.

Lord

Lord Chancellour.—I am of opinion, the bill to establish the custom is well brought; and that the parson, who is entitled to the inheritance, is properly made a party notwithstanding the tithes themselves were out on lease at the time for which the account is prayed; for otherwise it might introduce great inconveniencies by a collusion between the lessees and the occupiers; and that a bill may be even brought, without praying an account, to establish a mere right only, appears from the common case of bills for establishing *modus*, and therefore I shall direct an issue to try the custom of the tithes or tithes.

The course of proceeding in the court of exchequer, is to decree an account of tithes to the filing of the bill, but it will be time enough, when the cause comes back after trial, to search for precedents here in tithes bills, though I know the rule of this court in general is, where an account is directed, that it shall be carried down even to the time of the master's report, and not to the filing of the bill only.

The plaintiff could not properly amend his original bill by filing new matter which has arisen since the original bill, but ought to have brought a supplemental bill; but then the defendant should have taken advantage of this defect in form by a demurrer, and it is too late to make the objection after he has answered.

Next, with regard to the matter of right, as to lands for which an exemption is insisted on, against a demand for tithes in kind, though the charge in the bill is general, yet in the answer you must shew the particular exemption of the particular closes, which is not done in this case.

The question of right is upon an exemption claimed of all the lands that did belong to the monastery of St. Mary in the neighbourhood of York, which was one of the greater abbeys dissolved by stat. 31 H. 8.

It is certain they are discharged in the hands of the crown, and their grantees, in the same manner they were in the hands of the monastery at the time of the dissolution; but the evidence of this exemption depends upon usage; now it has been very rightly said, that a posterior usage is evidence of the antecedent, and has been always allowed so in cases of this nature, for what other evidence can be had?

It has been objected, that there has been unity of possession of the lands and the tithes in the Stapleton family, and that occasions

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the obscurity, and accounts for the non-payment of tithes; but the ancient lease produced by the defendants, where there is a covenant, that one of the ancestors of this family shall hold tithe-free, is an answer to this objection.

The next question is, as to the real composition for *main meadow* of about 200 acres, in which it is insisted, five acres, called *Tithe-acres*, are set apart in lieu of tithes for the rest.

It is very natural to think that the denomination of *Tithe-acres*, arose first from those acres being set apart from the rest in lieu of tithes; and it is a strong circumstance in favour of the defendants, to shew that this meadow is exempt from tithes.

It has been said, and very rightly, a *modus* to take part of the tithes for the whole could never have been at any time a satisfaction for the whole, and has always been holden a void custom. But in this case it is impossible to say, whether three hundred years ago five acres might be a sufficient composition for the tenth part of the whole; and therefore the objection fails as to the inequality between five acres and two hundred.

There are so many obscurities that the court cannot determine clearly, without directing a trial at law; for a jury will have much better opportunities of unravelling this difficulty; and a view of the lands themselves, and the boundaries, &c. will effectually quiet this question.

First issue, as to the manner and method of tithing.

Second issue, as to the exemption.

Third issue, as to the real composition.

H. 14 Geo. II. A. D. 1740. Scac.

Sneyd v. Unwin.

Hops how
tituable.]

BILL by the rector of *Henningham Sible* in *Essex* for the tithes of hops, claiming them to be set out by the tenth measure or weight after they are plucked from the binds, and before they are dried and packed. The defendant said, that he had tithed the hops by setting out the tenth pole, and had severed the binds from the roots, and stripped the vines off the poles, and left them on the ground; and he insisted on an ancient parochial custom, to set them out in that manner.

Upon reading the decrees in *Chitty v. Reeve*, 12th July, Tr. 4 Ja. 2. *Gee v. Perch*, 17th Nov. 1698, and 11th May 1704, and *Bliss v. Candler*,

Chandler, 18th Nov. 1720, the court decreed a trial at law by a special jury upon this issue, "Whether by the usage in the parish, hops are to be tithed before they are picked from the stalk?" A verdict was found against the custom, and the defendant was ordered to account (d).

H. 15 Geo. II. A. D. 1741. Scac.

Lake v. Bruton. [MSS.]

THE defendant set out the tithe of wheat, and plaintiff's servants came with a waggon and horses to fetch it away; but the waggon being three parts loaded with tithe-corn from other persons grounds, the defendant admitted he did, as he had a right to do, obstruct and hinder the plaintiff's servants from taking the tithes so set out, unless they would first unload what they had so brought from other persons grounds; which they refusing to do, the tithes were left and perished on the ground, the plaintiff refusing to fetch them away at any subsequent time, though often sent to by the defendant, who therefore insisted he ought not to account with the plaintiff for the value of such tithes.—Defendant decreed to account with costs.

The parson is not obliged to unload his waggon of the tithes he may have collected from one of his parishioners before he drives it into the grounds of another parishioner.

Tr. 15 Geo. II. A. D. 1741. Scac.

Rumney v. Willis. [MSS.]

BILL for tithes.—The defendant insisted, that on such a day (before the bill was filed) he tendered to the plaintiff 26l. and upwards, and desired him to take thereout what he pleased for his tithes, which the plaintiff was at liberty to do, and might have

What not a good tender.

(d) Some years afterwards a bill was filed by the same plaintiff against the above defendant's son, stating the above decree, and verdict, and that the court refused a new trial, and that nevertheless the defendant refused to set out the tithe of hops, as by law he ought. The defendant admitted by his answer, that he picked his hops in different parcels, viz. bright and brown; that he marked every tenth hill that had hops on it, and set it out for tithe; and that he caused his own hops and those on the said tenth hills to be picked, separating those on such tenth hills from his own nine parts, but not dividing them into bright and brown as he did his own, and that the plaintiff refused to take the said tithes. The court declared, that the method of tithing hops insisted upon by the defendant is not the legal method of tithing them, but that the hops ought to be picked and gathered from the stalks or binds before they are tithable, and the defendant was decreed to account. *Sneyd v. Unwin*, Tr. 1752. Scac.

1741.

done, if he would, but which he refused to do. And he said, that for peace sake and to avoid trouble and expence he was ready and willing, and by his answer offered, to pay the plaintiff 10l. in full for his demand, if the plaintiff would accept the same, which he believed was more than was really due. But not offering to pay it with costs, the plaintiff applied to the court, declaring he was willing to accept that sum with his costs, but the defendant refused to pay it with costs. The court on the hearing declared, that neither of the tenders was a good and sufficient tender to bar the plaintiff, and decreed an account with costs.

H. 16 Geo. II. A. D. 1742. Scac.

Crabb v. Hayne. [Decree-book, fo. 524.]

The parson is entitled to make his tithe-grass into hay on the lands which produce it.

BILL by rector for the tithe of hay, charging that the defendant set out the tithe in grass-cocks only, and refused to permit the plaintiff to make it into hay upon the ground which produced it. The defendant admitted, that he cut 160 acres of grass and made it into hay, and duly set out the tenth part thereof for the plaintiff as soon as the grass so cut was fit to be made into grass-cocks, and that setting out the tithe in that manner is according to the usual custom time out of mind practised in the parish: but he knew not that the plaintiff had any right to make such grass-cocks into hay on his (the defendant's) grounds, whilst he was using the same grounds for making his own hay thereon, and that the plaintiff was not either by law or by custom in the said parish entitled to such right, by reason that such confusion of properties and other inconveniencies would arise therefrom, as would make such custom (if any) absurd and void: that in case the plaintiff had any such right, he should have put it in execution; and if the defendant had obstructed him therein, then, and not before, he should have applied for such remedy thereon as the law directed; but that the plaintiff never attempted to put such right into execution. He admitted, that he refused to let the plaintiff's agents or servants make such grass-cocks so set forth into hay on the ground which produced the same, by reason of the inclemency of the season for hay-making, and the inconvenience and damage that must have accrued to the defendant therefrom, both with respect to his own hay and the ground whereon it was to be made.

At

At the hearing the court declared, that the plaintiff was entitled to make his tithe-grafs into hay on the defendant's lands where it grew, and ordered the defendant to account for the value thereof.

Tr. 16 Geo. II. A. D. 1742. In Canc.

Smith v. Wyatt. [2 Atk. 364.]

THE bill was brought by the rector of a parish in *Essex*, for the tithes of potatoes sown in great quantities in the common fields, and therefore claiming them as a great tithe. The defendant, the vicar, insisted that notwithstanding the potatoes were sown in fields, they still continued a small tithe, and the quantities made no difference.

Potatoes are a small tithe, though sown in large quantities.

Mr. *Clarke* for the plaintiff cited *Hutt.* 77. *Uvedale v. Tindall*, *Cro. Cur.* 28. S. C. and *Degge's Parson's Counsel.* 177. in order to shew that the quantities made a difference; and that when potatoes are sown in gardens, they are a small tithe, and when in fields, a large tithe.

The cases by defendant's counsel to prove them a vicarial tithe, were *Palm.* 209. 220. *Moore* 309. 1 *Ventr.* 61. 2 *Keb.* 612. *Compl. Incumb.* 392. 3 *Lev.* 365. *Parry* against the bishop of *London*, *Hilary* term 1705. *Wallis* against *Pain* and others, *Feb.* 8, 1708. *supra.*

The Attorney General said, it would be a great inconvenience to the people of *England*, if the rule which is laid down for the plaintiff, should be established, that quantity will denominate potatoes to be a great tithe.

Lord Chancellour.—The question is, Whether potatoes planted in fields, are great or small tithes?

Potatoes in their nature are small tithes; then the question will be, whether they receive any alteration of their right, by cultivating them in greater or smaller quantities? When the distinction of great and small tithes was at first settled, probably, it was upon this foundation, that the former yielded tithes in greater quantities, and the species of tithes, which were called small, were produced but in small quantities. Though it might be arbitrary at first, yet it has grown into a rule, and fixed so, for the sake of certainty; nor is there any authority cited, where it is said to be determined, that the rule of tithes should depend upon quantity, and not upon the nature of them.

1742.

In the case of *Udal* and *Tindal*, *Cro. Car.* 28. and in *Hutt*. 78. it is so laid down indeed, but there was no judicial determination; and in *Wharton* against *Lisle*, 3 *Lev.* 365. and 12 *Mod.* 41. lord chief justice *Holt* did hold that the tithes should be determined, whether great or small, from their quantity, and not their nature; but the judgement was contrary (e). If this sort of root should be called small tithes, when planted in gardens, and great, when planted in fields, it would introduce the utmost confusion, and must vary every year in every parish. If the quantity will turn small tithes into great, why will it not turn great tithes into small, when the quantity of great tithes is but small?

An objection has been made, that if this rule should hold, it would put it in the power of the occupier to change the property. To which I answer, so it will, for tithes are a fluctuating uncertain inheritance, and depend upon the course of husbandry; for a man may turn arable into pasture, and then the tithe, being agistment, is become a small tithe from a great one. Therefore, I think, as there is no judicial determination against this, I am warranted in my opinion, that the tithe of potatoes is a small tithe. [And his lordship decreed accordingly, that is (f), he dismissed the original bill that was filed in this case, but without costs, and decreed an account for the vicar on the cross-bill.]

M. 16 Geo. II. A. D. 1742. Scac.

Lamb v. Tatterfall. [2 Wood's Decr. 418.]

BILL by the rector of *Chipstead* in *Surry* for tithes (*inter al.*) of corn, and praying, that the custom used in that parish of tithing wheat in the shock might be established. The defendant said, that he had duly set out the tithes of his wheat in the sheaf, and given the plaintiff notice to fetch the same away, which he had refused to do; and he denied, that there was any custom in the parish of tithing wheat by the shock. An issue was directed to try, whether the custom of tithing wheat in this parish, was by the shock, or not; and the verdict of the jury negativing the custom, the bill was dismissed as to the tithe of wheat, with costs, both at law and in equity.

(e) And note, *Holt* absented himself when the judgement was given, whence the chancellor inferred according to one report of this case, (6 *Bac. Abr.* 732. 8th edit.) lord *Holt*'s consciousness of his inability to support his opinion. See the same remark by lord C. B. *Comyns*, *supra* 754.

(f) From a manuscript in the possession of Sir J. Mitford.

H. 16 Geo. II. A. D. 1742. Scac.

Chapman v. Keep. [2 Wood's Decr. 424.]

BILL by the rector of *Stratfieldsea* in *Hants* for tithe-agistment of sheep. The defendant stated, that he held a number of farms in the parish, one of which was his own, and the rest he rented of another person; and he set forth the respective values thereof, and the numbers of the sheep which he had agisted thereon; but said, that he could not set forth a particular account of what profit he had made by wintering or fattening sheep, not having kept any account thereof; and that the reason why he did not keep an account of, or pay the plaintiff the tithes of such sheep as he had wintered or fattened, was, because all the said sheep, which he had so wintered or fattened, were agisted and fed on lands which had paid tithes of corn or hay to the plaintiff in the same year; and that there had been no instance in the said parish of tithes being paid or demanded, either by the plaintiff or his predecessors, for sheep wintered or fattened on lands which had paid tithes the same year; and he insisted, that no tithes are due by law for such sheep.

An agistment tithe is not due for sheep depastured on lands which have paid tithes of hay or corn the same year.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon hearing counsel on both sides, and reading the deposition of *William Wallis*, and upon full debate; the court ordered the bill to be dismissed, with costs, so far as it related to the agistment tithes of sheep fed on stubbles and fields mowed, which had paid tithes of corn or hay the same year to the plaintiff.

But the court ordered the defendant to account for the agistment tithes of sheep brought into and sold out of the parish, which had not paid to the plaintiff the tithes of wool and lambs; and of such sheep as were agisted in the said parish for hire, during such time as they were not depastured upon stubbles of corn, or upon fields mowed, whereof tithes had been paid to the plaintiff.

The costs and further directions to be reserved till after the report.

1743.

Tr. 17 Geo. II. A. D. 1743. Scac.

Fanshaw v. More. [Mr. Joddrell's MSS.]

A layman
cannot pre-
scribe in *non*
decimando
even against
a lay impro-
priator.
Semb.

A BILL was brought by a lay impropriator for tithe of hay and potatoes against the defendant, the occupier of the soil. The defence was, that neither the defendant nor any of those under whom he claims, had ever paid any tithe for this ground, nor any *modus* or composition for the same. It was said for the defendant, that the reason why a layman should not prescribe in *non decimando* was founded on principles which did not hold since tithes were lay inheritances: that now from length of time and possession there was the same reason to presume a grant from the lay impropriator in this case, as in cases of other inheritances: that this was not used as a prescription, but as an evidence of right, and to include a presumption of a grant: that before laymen were capable of tithes, an exemption was not sufficient to arise from non-payment only; but since, it is quite otherwise, and possession in the hands of a layman is as good an evidence of a right to tithes as any other right: that the case of *Slade and Drake* in *Hobart* is built on very insufficient reasoning; and what is said by him and lord *Coke* was owing to the influence of the times rather than any legal reason.

Lord C. B. This is a direct prescription in *non decimando*. And all the cases are very strong, even since the reformation, that a layman cannot prescribe in *non decimando*. And whether the right of tithes be in a lay impropriator, or in a spiritual one, can make no difference. This doctrine is expressly laid down by lord *Coke*, lord *Hobart*, and Mr. *Selden*; and a grant is not to be presumed, because it is against the canons. It has been said, that the statute of H. 8. which makes tithes lay inheritances, has altered the case. But a prescription from that time will not be good, and, consequently, that statute cannot create a right by prescription. This doctrine is not inconvenient; for grants of tithes may be preserved by enrolment, and therefore are not likely to be lost if due care is taken to preserve them. The cases to this purpose are all this way, *Webb v. Warner*, Cro. Ja. 47. *Slade v. Drake*, Hob. 296. Corporation of *Bury v. Evans*, in this court, 2 P. Wms. 573. In all which cases this point was fully considered, and the same was insisted upon as in this answer. An act of parliament was attempted to remedy this by Sir George *Heathcote* about fifteen years ago, which

which miscarried. I am therefore of opinion that the plaintiff is entitled to an account.

Baron *Carter* was of the same opinion, and cited *Benson v. Olive*, 1727, in exchequer.

Baron *Reynolds* doubted.

Baron *Clarke*.—I know no case which deserves more consideration than this. For though the authorities against such a prescription are very great, yet the reason of them grows weaker every day. Before the reformation all tithes were ecclesiastical; and a layman could have tithes by way of discharge only by the grant of parson, patron, and ordinary. Since that there are many other ways both of having tithes and being discharged from them. Since tithes have been in the hands of lay impropiators, many persons have purchased discharges for their particular lands; yet if those grants are lost by the common fate of things, those persons must lose the benefit of their purchases. And that must often happen though they be enrolled, or any other way be taken to preserve them. Very few records relating to the church are even now extant. And it will be very hard that time, which strengthens all other rights, should weaken this. The resolution in *Hobart* seems to me to be very extraordinary, and his reasons are not satisfactory to me. This will render all discharges of tithes very precarious. It seems very extraordinary that a layman may prescribe upon a presumption of a grant being lost for a portion of tithes in the soil of another, even against the rector of the parish, and yet cannot prescribe for the tithes of his own lands in the same way. If therefore I should concur in this opinion, it will be merely by the force of authority; for I think that the reason of the thing is strong against it. I allow that in general authorities ought to prevail in law, because great inconveniencies and confusion will arise from overturning established rules of property. But in this particular case the inconveniencies and confusion of property will be much greater from pursuing these resolutions, than from overturning them. Nor will this be of real disservice to the clergy, many of whom I have known undone by this notion, who have brought bills for tithes merely in expectation of succeeding by defects in the defendant's title to his discharge.

B. *Reynolds* and B. *Clarke* desiring time to consider of it, the cause was adjourned.

N. B. Judgement, as I have been informed, was afterwards given for the plaintiff.

M. 17 Geo. II. A. D. 1743. In Canc.

Talbot v. May. [3 Atk. 17.]

To a bill for tithes of a mill the defendant pleaded a *modus* for the mill, when it was part a corn-mill, and part a fulling-mill; but the defendant having since taken away the fulling wheels, and put a pair of mill-stones in their room, the plea was over-ruled.

*Supra 596.

THE bill was brought for tithes of a mill, and a plea of a *modus* of 6 s. 8 d. for the mill, when it was part a corn-mill, and part a fulling-mill. In 1719, the fulling wheels were taken away, and a pair of millstones put in their room, and it has been ever since a corn-mill.

Mr. Attorney-General for the plaintiff.—It was anciently a fulling-mill, and the corn-mill and the fulling-mill are now under the same roof, and the *modus* cannot extend to cover a newly erected mill, for as it is altered to a corn-mill, it must pay tithe in kind.

Mr. Hamet, of the same side, cited the case of *Newte* against *Chamberlain* *, heard first in the exchequer, and afterwards in the house of lords, where it was determined, that every water corn-mill must pay corn as a personal tithe.

Mr. Talbot of the same side cited 1 *Roll. Abr.* 656.

The counsel for the defendant insisted, that the *modus* covers the mill, let the engine of the inside consist of wheels or stones, and therefore changing the working part makes no variation, but the *modus* will still cover it, as it is a mill, though of a different kind. That adding new stones to ancient mills will not alter the *modus*, nor destroy it, where the stones are under the same roof.

Lord Chancellour.—The plea in this case must be considered, both in respect to the form and substance, and upon either it cannot stand; for as it is not *ad idem*, it is impossible to know to what it is applicable. Here are three mills charged by the bill to be working mills; the defendant pleads a *modus* to one only called *Birdlep* mill. All of them at present are used as corn-mills, and therefore the plea is quite uncertain, if this point could be laid aside, which I cannot do. Consider it next upon the substance. I will consider them as two new corn-mills, but under the same roof.

Suppose first, an ancient mill under a building, worked with one wheel, and the owner under the same roof thinks proper to erect two new wheels, and two new stones, I am of opinion, this is to all intents and purposes two mills, and he cannot cover them with the same *modus*; you might as well say he might erect another mill upon the same stream, and call it one mill.

Suppose

Suppose two ancient mills in the same parish, which paid tithes in kind, and another miller who had a fulling-mill, covered with a *modus*, should turn it into a corn-mill; it would prejudice the person in the other mills, as the newly-erected one would diminish the trade of three mills, and the person suffering by those means, ought to be recompensed by the payment of the tithe for the mill so converted. 1743.

The reason the cases go upon, why a *modus* is destroyed, where two stones are erected instead of one, is, because the miller can grind a double quantity.

Consider it in another light,—formerly, there were two fulling-mills and a corn-mill under the same roof, and the fulling-mills are now turned into two new corn-mills; this is just the same thing, as if the defendant had erected two new mills.

The fulling-mills can only pay a personal tithe, because it is only in nature of a trade, but when there are corn-mills, each is to pay a tenth dish *. In this case, thus much must be shewn, that there was a custom in this parish for fulling-mills to pay tithes, otherwise they do not properly pay them. The only colourable thing is, it was an ancient *modus* for the land, and the mill is but an accidental quality. But it is not pleaded for the land only, but as a conjunct *modus* for land and mill too, and therefore let the plea be over-ruled. * Qu.

H. 19 Geo. II. A. D. 1745. In. Canc.

Ekin v. Pigot. [3 Atk. 298.]

THE bill was brought for tithes in kind of the manor of *Doddefhall* in the parish of *Quainton*. The defendant insists upon a *modus* of 48 l. in lieu of all tithes for that manor.

The plaintiff's counsel objected that it was too rank, for the whole rectory was worth but 33 l. a year in *Henry* the eighth's time; and the whole demesne lands of that manor in queen *Elizabeth*'s time were worth but 48 l. a year, so that the *modus* was full as much as the manor itself.

Mr. *Mills* for the defendant cited *Chapman v. Monson*.

Supra.

The plaintiff proved as exhibits the value of the first fruits from a return made by the augmentation office, and for the value of the manor an inquisition *post mortem*.

Lord

1745.

Lord Chancellour.—There is no person more unwilling than I am to set aside such payments in lieu of tithes, but there must be some ground of law upon which to support them.

The first objection was of its being too rank a *modus*, and consequently could not be time out of mind; for the manor is now but 80 l. a year, and according to the natural improvement of lands from Henry the eighth's time, it ought to have been ten times as much, on account of money sinking in its value, and lands rising in theirs.

The returns from the first fruit's office, and the inquisition *post mortem*, though they are not conclusive evidence, yet sufficient upon the circumstances of this case, because the defendant has not produced any evidence to contradict it.

Taking all the evidence together, this appears to be nothing more than a composition upon agreement, which parsons have submitted to in succession, from time to time, and is merely a personal payment, not a composition real, which is some charge given to a parson upon lands, under a deed to which himself, the patron, and ordinary, are parties, and of a different nature from this.

The plaintiff therefore must have a decree for tithes in kind.

Reg. Lib.
a. 1745.
fol. 275.

Tr. 19 & 20 Geo II. A. D. 1745. In Canc.

Hardcastle v. Schluter and others, [MSS.]

and

Sir *Hugh Smithson* and others *v.* *Hardcastle*.

A *modus* that the occupiers of lands and tenements within certain villis in the parish of C. not being parcel of the demesnes or granges of the monastery of C. shall pay several sums, that is, so much in certain for each vill, in lieu of tithes of hay, is good.
Ambl. 41.
S. C. 3 Ark.
245. S. C.

THE original bill was brought by the plaintiff as impropiator of the impropriate tithes in the parish of *Coverham* in the county of *York*, for an account and satisfaction of tithes of hay growing within the said parish. The defendants in bar of this demand, insisted by their answers, there were, and time out of mind had been, several usages or customs within the several villis of *A. B. C. D.* and *E.* lying within the said parish of *Coverham*, that the owners and occupiers of lands and tenements within the said villis, had used to pay on a certain day every year (mentioning it) to the rector or impropiator of the parish church of *Coverham* the several sums following, in lieu and full satisfaction of all tithes of hay growing and renewing within the said villis; then the answer states the particular sums that each vill was to pay, but as to the village of *Coverham* there was an exception, that the *modus* did not extend to the demesnes or granges of the monastery of *Coverham*. Then the answer sets forth, that for the ease of the said rector, the said several

several sums had been always collected by the constables of the vills. The defendants also brought their cross-bill in behalf of themselves and the other owners and occupiers of land within the said vills, to establish these *modus*es insisted upon in their answers to the original bill.

Mr. Attorney General argued for the plaintiff, That these *modus*es were void upon the face of them; for it was unreasonable that any one occupier should be liable for all the tithes of all the rest, and therefore it could not be presumed that all the occupiers should ever come into such an agreement, each to make himself answerable for the tithes of all the rest; and that several *modus*es had been held bad, because they were to the disadvantage of the tenant, as in the case of *Baker and Cocker, Hob. 329.* [and *supra* 385.] 1 *Saund.* 142. and 1 *Ventr.* 3. The court said the *modus* in *Keble* 280. would have been good, if it had been laid that *quilibet* occupier should pay, which would have been paying a particular sum for each particular person. It was likewise said that this *modus* was void for the uncertainty what each particular occupier should pay; and that it is a rule that a *modus* should be as certain as the duty it comes in lieu of. 2 *Salk.* 657. That it was also uncertain who the person was that was to pay; for that there might be several different occupiers in one year. It was also insisted, that this *modus* was void, because of the difficulty the impropiator must have in recovering it; for as he has a joint remedy against them all, he must make them all parties to his libel in the spiritual court, or his bill in this court; and that it would be impossible for him to recover, as his bill or suit would be continually subject to abatement by the death of parties. Another objection was, that this was a rank *modus*, for that it was to pay a *modus* of 7l. in lieu of tithe of hay; whereas it appears by the parson's account, that at the time of the dissolution of monasteries, the tithe of hay in kind was only valued at 40s.; and, consequently, that as bills to establish *modus*es were to be looked upon as bills for the specifick executions of agreement, the court would not think itself bound to establish an agreement for a *modus*, which is exorbitant and exceeds the tithes in kind.

As to the *modus* set up for the village of *Coverham*, with an exception of the demesnes or granges of the monastery of *Coverham*, it was urged to be void for three reasons. The first, Because a custom cannot be laid in a vill, and applied to a particular place in that vill only, for it must extend to the whole vill, other-

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So Nichol-
son v. Smith,
1 Lutw.
128.

wife it is not the custom that is laid, as was holden in *Polus v. Henstock*, 1 *Ventr.* 97. The second, Because it is uncertain what the extent of the demesnes or granges is. The last, Because the monastery is within the time of memory.

The case of the bishop of *Hereford v. Payne*, 10th Feb. 1722, was cited, where the *moduses* were laid in the same manner as here, in the owners and occupiers, and the whole court held, upon solemn argument in the exchequer, that the *modus* was void, because of the confusion it would create in respect of the proportions that each of the occupiers was to pay, besides the difficulty the parson would lie under in recovering it.

On the other side, Mr. Solicitor General *Murray* argued for the defendants, That this is a good *modus*; for that it must be presumed, that at the time of entering into this agreement, one person was owner of a whole vill, and that, consequently, by the branching it out afterwards and dividing it into several, the parties could not destroy that *modus*, which was originally in its commencement a good one; as, where there was a *modus* for lands contained in a park which belonged to one person originally, and was afterwards disparked and divided out among several persons, that was held not to destroy the *modus*; for the prescription went to the land, and not to the park; consequently, as it was a *modus* in respect of the land, it was not destroyed by dividing the land. Besides, the tithes, as a spiritual fee, are gone and extinct, and cannot be revived again; on the other hand the *modus*, which comes in lieu of the tithes, is become a spiritual fee, for which the parson has a remedy in the spiritual courts. And it is not necessary that the parson should make every one of the occupiers party to a suit for this *modus*, because each occupier is liable for the whole. And in this respect it is like the case of a rent charge, it is a condition annexed, that no part of the land shall be discharged till the whole *modus* is paid; and this is no hardship upon the occupiers, because they purchased subject to this *onus*. As to the case of the bishop of *Hereford* and *Payne* in 1722, he said, that the *modus* there was laid in the inhabitants and occupiers, and not in the owners and occupiers, as here; but he said that the case came afterwards in 1732 before the court of exchequer, by the name of the bishop of *Hereford*, as rector of *Whitchurch*, against the duke of *Bridgewater*, *et c contra*, and the *moduses* were laid *verbatim* as they are here, and the same suggestion that for the case of the rector they were collected by the respective con-

ables of each vill; but this was only laid by way of inducement, as here, and was not laid as any part of the *modus*. The bishop demurred on the cross-bill for the establishment of the *moduses*, insisting they were void in point of law: it was solemnly argued, and the judges delivered their opinions *seriatim*, and overruled the demurrer, and directed issues to try the *moduses*, which they would not have done had they thought them bad in point of law.

As to the objection to that *modus* which was laid with an exception, he said the case cited in 1 *Ventr.* 97. was of a custom which cannot be laid with an exception, but that here it is a prescription which is personal, and not local, as a custom always is, and as it is personal it may be laid with an exception of a particular place. As to the objection of the uncertainty of the extent of the demesnes of the monastery, that will be ascertained by issues to be directed by the court. As to the opinion, that the monastery is within the time of memory, that is only from the description of the lands excepted, and it is not necessary that the lands should have the same description at the time of establishing the *modus*. In regard to the uncertainty of the persons who are to pay this *modus*, as a certain day is fixed for the payment, whoever is occupier at that day will be liable to pay, so that the person will be sufficiently certain. As to its being a rank *modus*, that will be proper to lay before a jury in order to shew that there never was such a *modus*, but that objection does not go to the legality of the *modus*. Besides, the minister's accounts are not conclusive, though they are proper evidence; for they are no more than an inquest of office not taken between any parties.

An objection was made in this case to reading the inquisition, which was returned by the commissioners appointed by king H. 8. to inquire into the value of the land and tithes, because the commission was wanting, and it was said, that the court could not presume a jurisdiction; and Mr. *Wilbraham* cited the case of *Baker* and *Oldham* before lord justice *Eyre*, where he refused the minister's accounts to be read for want of a commission. But, notwithstanding this, lord chancellor suffered them to be read; he said, it was true, that in inquisitions *post mortem* the court refused inquisitions to be read without having the commission, because they are of a private nature; but that he had never known the objection allowed in such a case as this; that he had known even copies of part of the minister's accounts read.

1745.

The Chancellour after term delivered the following opinion at *Lincoln's Inn Hall* on the 11th of *July 1745*. All *modus*es were at first upon an agreement between the parson, patron, and ordinary, by some instrument in writing in the nature of a contract or composition, which, though decayed or lost by accident, yet being run out into a prescription, remains good; and the court will not break in upon such ancient usages upon slight reasons, for fear of introducing general inconveniences. Purchasers buy lands in parishes upon the faith of these *modus*es, and give more or less for the lands according to the greatness or ease of the *modus*, and the seller goes upon the same principles. The parson accepts his living upon an expectation of these payments; and the lay impropriator purchases in contemplation of them; and it would be unreasonable to overturn *modus*es upon trivial grounds; for that would be to deceive the purchasers of land, who bought with a view of paying no more than the *modus*; and it would be throwing an advantage upon the lay impropriator by letting him into tithes in specie, which he never stipulated for. But, if this *modus* cannot be preserved by the rules of law, it must sink.

The first objection is, that it is unreasonable, because it is for the occupiers of lands and tenements to pay the *modus*; that those words take in arable and wood land and all other species of land, and houses, although they do not produce tithe-hay, and ten persons are made contributory to this *modus* who would not be subject to the tithe of hay in kind; and that therefore there is a violent presumption, that no such agreement could have been entered into between the parson, patron, and ordinary, and the owners and occupiers of lands and tenements; because those owners and occupiers who had only houses or such sorts of lands as did not produce tithe-hay, would never have come into such a *modus*. And it has been said, that the parson may make this objection to the *modus*, as well as the occupiers. And I am of opinion he may; but the objection will not avail him; for it does not raise such a presumption as is mentioned. For only suppose, that at the time this agreement was entered into, all the lands in these villis were in the hands or ownership of one person, it might be reasonable for such a one to enter into such a *modus*. Nay, though they were in the hands of different persons, some of whom were occupiers of arable or wood land at the time of such agreement, yet they might also have meadows, which produced tithe-hay, or they might have it in their mind to

alter

alter the culture of their arable or wood land into land for the produce of hay, so that it might also be reasonable and prudent for them to enter into such agreement, in expectation of their so altering the produce of their arable lands. This objection is frequent in these sorts of *modus*; and in several of the cases cited, the *modus* has been in lieu of particular sorts of tithes; as, in the case in 1 *Vent.* 3. there a prohibition was prayed to stay a suit in the spiritual court for tithes, upon the suggestion of a *modus* for the proprietors or occupiers of such a manor, or any parcel thereof, to pay a groat to the parson for herbage-tithes. But the court held this could not be; for if a man had but two feet of ground, he was to pay as much as a man who had a thousand acres; but that it would have been good, if it had been laid in the proprietors and occupiers generally, and yet such occupiers might not have lands producing tithe of herbage in kind. Therefore I am of opinion, that there is nothing unreasonable in this agreement.

The next objection against this *modus* is, that in the first place it is not sufficiently certain, and the rule of law is, that the *modus* or customary payment ought to be equally certain to the parson or lay impropriator, as the tithe in lieu of which it comes. In the next place, that it is not sufficiently certain to the parson or impropriator, in point of remedy, which ought to be equally certain with that for the tithe in kind. It is true, the general rule is, that the *modus* must be equally certain with the tithe, as it comes in its place; and therefore in the case of *Startup* and *Dodderidge*, 2 *Salk.* 657. [*supra* 587.] a *modus* to pay 2 s. in the pound of the improved rent in lieu of all the tithes was held nought; for that is to rise and fall as the land is let, and the parson cannot know it. And though a custom to pay a double value for a fine may be good, yet that arises from a man's contract, which shall never be void, where it may be ascertained; and differs from a *modus*, which ought to be as certain as the duty which is destroyed by it. *Holt* chief justice doubted, and this was upon a motion for a prohibition. I incline to differ in opinion from that case, and think the *modus* was sufficiently certain; for when the books say the *modus* must be equally certain with the tithes, yet that must not be weighed in too nice scales. And in the case of *Cowper* and *Andrews*, *Hob.* 39. [*supra* 275.] the *modus* was not equally certain with the tithes. That was a *modus* for 140 acres, parcel of an ancient park, and the party laid his *modus*, that he and all those whose estate he had in the said 140 acres, and all the farmers and occupiers thereof, had used

time

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time out of mind to pay to the vicar of *Cawfield* for the time being, 2s. a year, and one shoulder of every head of deer that within the same park should be killed, in full satisfaction of all tithes renewing upon the same 140 acres, which the vicars had always accepted in discharge of all tithes. The *modus* was not equally certain with the tithes, for the owner of the park might kill no deer, or only two, and there the vicar would have no venison in lieu of his tithes. And *Hobart* says, if the park should be dis-parked, and the deer all destroyed, there the vicar would never more receive any venison, and yet the *modus* would be good, and supported by the 2s. And though the books say generally that *moduses* are to be equally certain with the tithes, that must be taken to a common and reasonable intent, and not to every possible intent, and to be weighed by grains and scruples. As to the payments in the present case, they are equally certain to the parson as the tithes. The material objection is to the uncertainty in point of remedy.

As to the remedy, it is said the parson would be without remedy for these *moduses*, or that his remedy would be almost equal to none, for that he must make all the occupiers parties to his libel in the spiritual court, and if any one of them die the suit is abated, for the charge is joint, and not separate. It is also added by way of objection, that here the *modus* is laid for the occupiers of lands or tenements within these villis, and not said all the occupiers of all the lands and tenements; and that this is also uncertain, for it may be that only some of them are chargeable, and not all. But there is no ground for this. For I take it that the occupiers of the lands and tenements in the villis, import all the occupiers of the lands or tenements within those villis. And as to the remedy, that all the occupiers are jointly liable, it is said it is unreasonable; that the parson must be obliged to make all the occupiers of land within each vill party to his suit to libel in the spiritual court, and that is the remedy to be considered; for it is the legal remedy which the common law and our constitution gives for *moduses*; and that the remedy in this court is not taken notice of, for the suit for *moduses* is drawn here not as having a proper and natural jurisdiction to try *moduses*, but as the party prays an account of the *modus*. It is truly said for the plaintiff in the cross-bill, that at the time of this agreement, which is to be the foundation of the *modus*, all the lands might belong to one owner; and that the agreement was at the time reasonable, and that the future branching out of these lands among

among other purchasers will not destroy the *modus*. A *modus* to be paid by the owners and occupiers of the demesnes of such a manor is good; and though the demesnes are of never so great an extent, and afterwards divide each into numerous hands, either by descent or sales, yet that alteration has never been held to destroy a *modus* which was good in its original. The cases of lands in parks are all authorities to this purpose. And the cases of *Crowper* against *Andrews*, and *Shelton* against *Montague*, both in *Hobart*, are of lands within a park. In the former case the lands were 140 acres; in the latter the quantity does not appear. But parks may consist of more than 3000 acres which may be disparked, and divided into several farms; and if a *modus* was paid for the park when in one hand, a division of it into many hands will not destroy the *modus*. If this doctrine is to be allowed, that all the occupiers are to be made parties to the libel, it will extend to all those cases of manors and parks, for they may be divided as much as these villis. The cases which were vouched to prove, that such *moduses* as these are not to be allowed, do not come up to this, but make against it, and prove that such *moduses* in occupiers of lands are good ones. That of *Crowper* and *Andrews* in *Hob.* 39. was, that lord *De la Ware* was seised of 140 acres, and that he and all those whose estate he had, and all the farmers and occupiers thereof, had used time out of mind to pay the vicar of *Cawfield*, for the time being, 2s. a year, and one shoulder of every third deer, &c. And that was laid in the owner of the fee and all the farmers and occupiers jointly, and the remedy there was to be taken jointly in the spiritual court. If the prescription had been laid in the owner only, there it would not have been good, because he might reside out of the jurisdiction of the spiritual court in that diocese, out of the reach of any ecclesiastical court; therefore the prescription must be so laid, that the farmers or occupiers may be made parties. In the case of *Shelton* and *Montague*, *Hobart* 118. it was that *A.* and all the occupiers of a particular part of a park have time out of mind paid to the parson yearly 4 l. in full satisfaction and discharge of all the tithes of the said grounds; here, the prescription is laid in the occupiers; the quantity of the land does not appear; and the quantity of the land does not differ the case, for there might be many occupiers; and yet the *modus* was good. And such a prescription for a *modus* in the occupiers is good; for although occupiers cannot prescribe for a matter of interest in inheritance in themselves, but the prescription must be laid in the owners, yet when it goes in discharge of a right in another person, as a *modus*

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is, or by way of easement, there, it may be well laid in the occupiers; and such precedents have been frequent. And the same point is determined in 3 *Lev.* 386. *Stopp* against *Peacock*. I mention these cases to shew that the *modus*es are good though the prescription be laid in the occupiers; although those occupiers are incertain and may be a great number of persons. Another case cited for the plaintiffs in the original cause is, *Hobart* 329. But that was no *modus*; for the vicar libelled for tithe lambs, and laid a custom that all lambs ingendered, fallen and bred upon any one tenement, or living in the parish, although they belonged to several owners, had been reckoned together as one man's, and the tenth lamb of them so counted together was to be paid for tithe. A prohibition was prayed, and granted, because all customs against common right are triable at common law; and further the court was of opinion, that the custom was unreasonable and against law; for by this means it might fall out, that some one might have but one lamb, and that might be taken for tithe; and he who had more, might pay nothing at all. But here was no *modus*; for the libel was for tithe in kind, and the custom was not laid as for a *modus*, but for a particular method of taking the tithe in kind, more than his tithe in kind, and from persons not liable to pay any. And this was no discharge to the parishioners, as a *modus* should be; for the parishioners could not get by such a custom, but might suffer by it; for if any parishioner should have under ten lambs, he would not be liable to tithes in kind; but by this custom of counting all the lambs in the parish together as one man's, he might pay even more than one lamb out of a number under ten. As to the case in 2 *Keble* 280. it is very darkly reported. A prohibition was prayed upon a suggestion, that all the occupiers of land within such a vill used to pay 2 s. 6 d. in full of all the tithes of the said vill, which the court held not to be reasonable, there being no remedy to compel any who refused to contribute. But, if it had been, that *quilibet occupator* had used to pay, it had been good, and a prohibition was denied. Now whether the court meant that it should have been, *quilibet occupator* was to pay the whole 2 s. 6 d. or that they were jointly and severally liable to pay it, it is mighty incertain in what sense it is meant there. And the case of *Stopp* against *Peacock*, in 3 *Lev.* 386. is contrary to it. There a prohibition was prayed, and at last granted, on suggestion of a *modus* to pay by all the tenants and occupiers of the lands so much in discharge of tithes: there at first was a doubt that such prescription

prescription in the occupiers was not good, but it was over-ruled and holden good: and yet there the objection might have been made in the same manner as in 2 *Keble* 280. that the parson could not have remedy, unless he made all the occupiers parties to his libel. But I am not clear, that it is necessary for the parson in such case to make all the occupiers parties to his libel. It is certain, that the *modus* affects all the lands; and it is admitted in this case by the answer to the original bill, that every part of the land is chargeable with the *modus*; the consequence of which is, that no particular occupier can be discharged unless the whole *modus* for the vill is paid; and if that be so, it would not be a very unreasonable construction for the spiritual court to make, that every occupier is liable to the impropiator *in toto* and *solido*, and that remedy lies against each, and that they shall be entitled to contribute among themselves. If the remedy was against the land, it would be so, as in the case of rents. Let the land-owners divide the lands never so much, yet the owners of the rent may distrain for the whole in any part of the lands in the hands of any single occupier. But here it is objected, that the lands are not liable to the *modus*, and that there is no real remedy for it against the lands: though that be so, yet the occupiers are chargeable with the *modus* in respect of the lands; for none of the occupiers or their lands can be discharged until the whole *modus* is discharged. I do not know the rule of proceeding in the spiritual court, but it seems reasonable for them to suffer a libel against any one of the occupiers for the whole *modus*, and to compel a contribution among themselves. But be that as it will, consider how this comes before me. If there was nothing more in the case than what appeared in the case of the bishop of *Hereford* against the duke of *Bridgewater*, I would not disallow this *modus* upon this objection, but would have the fact tried at law. That case was twice before the court of exchequer, and the material one was that in 1732, and it is of much weight with me that it was in a court which has the natural jurisdiction of tithes, as far as it is the king's court. In that court is the greater number of cases, and there they have the largest experience. The last bill had a demurrer to it, and it was argued before a very great and learned judge; and the whole court was of opinion to over-rule the demurrer upon a confidence, that the *modus* was good; but that it was of too great consequence to overthrow the *modus* upon a demurrer. But why so? the case was as fully before the court in point of law as to allowing the *modus*,

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modus, as it would have been at the hearing of the cause. Nay, it was a proper time to have it before the court. Suppose there is a motion for a prohibition; if a valid objection is made to the *modus*, the courts of law refuse the prohibition; if not so, they grant it, that the parties may declare in prohibition. In fact, upon over-ruling the demurrer in the bishop of *Hereford*'s case, the cause came on to a hearing before lord chief baron *Reynolds*, who was a new chief baron; and upon the hearing the court did not allow the objection to the *modus* in point of law, and was of opinion it was to be tried, and that it would be good in law, if it could be established in fact. And lord chief baron *Comyns* was of the same opinion. Here therefore is the opinion of the court of exchequer, repeated in the times of different chief barons, and no appeal from that decree, though a case of great value and consequence. And therefore in this case the court would do too much to over-rule this *modus* upon the like objection, especially as it is admitted in the answer of the impropiator, to have been paid beyond memory. This *modus* therefore must be sent to be tried upon an issue, and upon the trial many objections may be taken advantage of as to the reasonableness of the *modus*, or that the parties would never have come unto such an agreement.

As to the first case of the bishop of *Hereford* and *Payne*, when lord chief baron *Eyre* sat in the court, it differs from the other case in 1732, and I think the *modus* in the first cause was clearly not good. For the *modus* there was, that there has been an ancient usage beyond memory in the parish of *Whitechurch*, &c. that the owners and occupiers of lands in the said parish have paid a yearly *modus* to the rector in lieu of the tithes of corn, grain, hay; and that each township paid yearly on the feast of *All-Saints* for such *modus* a certain sum of money; which money, to prevent trouble to the rector, was collected by the constable, and by him paid on such feast to the rector; and that after the parish collected the sum, because some people paid but very small proportions and paid it to the rector. The *modus* there is, that each township paid a certain sum without specifying what sum: that can be no *modus* for want of ascertaining the sum; but the *modus* is there referred to and made certain by an instrument signed by Dr. *Fowler*, as rector of the parish, and registered in the parish books, which sets forth the *modus* to be beyond memory, for the inhabitants, owners, and occupiers of lands, &c. to pay a certain sum in lieu (mentioning it). Now this instrument sets forth a *modus* different from
that

that in their answer; for that is set forth to be in the owners and occupiers only; but this instrument, which was the material thing, set it forth to be in the inhabitants, as well as the owners and occupiers of lands; and such *modus* cannot be good for inhabitants. There may be, who have neither lands, &c. of their own, nor are occupiers; and it was impossible to say what they had laid for the *modus* in that case. As to the inhabitants, the *modus* must be bad as to them; for a man is only liable to a *modus* in respect of land; and a person who receives alms may be an inhabitant, but yet not subject to a *modus*; so that the *modus* is ill either way upon the answer; because no sum is specified upon the instrument; because it extends to inhabitants generally, and as such they were liable only with respect to lands.

As to the other case of the bishop of *Hereford* against the duke of *Bridgewater*, that was heard in the year 1732; as to the material parts of it, it seems to be a case in point. There, the *modus* was laid in this manner, and must be taken upon the cross-bill, because that was brought to establish the *modus*. It is said, that there is and has been an antient usage before the time of memory, for the occupiers of the lands in the said parish to pay in the manner after-mentioned, yearly, on the 1st of *November*, to the rector, the yearly sum of 12 l. as a *modus*, in lieu of tithe-hay. The bill then goes on, and states the several proportions between the vills, and there the *modus* ends. A deal is said afterwards as to contributions among the occupiers of the several vills as among themselves. In the first place it is to be observed, and it is to be attended to here, that the custom to have the *modus* paid in the manner thereafter mentioned, relates only to the division or proportion among the several vills; for if it relates to the other parts, *viz.* the contribution between the several inhabitants among themselves, it would be bad; because it only said that the proportions among the several inhabitants or occupiers were certain or known, and does not state them in certain sums; whereas the proportionate sum charged on each vill is set forth particularly, as, that the vill of *A.* paid 4 l. 12 s. 5 d. and so of the rest; and that other part, as to the contributions of the occupiers among themselves, may be laid out of the case; for the *modus* is good without it. The above is of a custom to pay, &c. and that is the present case; nay, it is better here, because there are distinct customs for each vill to pay certain sums, naming them. And as to what is mentioned in the answer to the original bill, that does not differ the case, because, though in such answer

1745. fwer they might shew the proportions of some particular lands, the owners or occupiers of which were brought before the court ; (for the bill is for tithes in kind, and therefore the plaintiff was under no necessity to make all the parishioners parties, but only so many of them as he wanted to charge) ; yet the answer should have set forth the certainty of the sum for all the occupiers of land in the vills, and therefore for want of that could not be taken into consideration. Upon the whole, I am opinion, that this case of the bishop of *Hereford* against the duke of *Bridgewater*, is a case in point ; that, consequently, as the court of exchequer sent that to be tried before they would give their opinion ; so here I shall think it right to follow the same rule.

His lordship therefore directed an issue to try the fact of the *modus*, and decreed an account for the agistment tithe (g).

It seems highly probable, that the issue was found for the defendants ; for it appears by the Registrar's Book 1746. 65 b. that an order was made on the petition of four of the defendants, *Watson, Dixon, Yeoman, and Wilson*, to set down the cause for hearing as to them on the equity reserved ; and no further directions being met with, it is to be supposed, that the plaintiff submitted and settled the cause.

H. 20 Geo. II. A. D. 1747. Scac.

Thomas v. Rees. [MSS.]

Corn not removeable from the place which produces it before the tithe is set out, though such removal be made without fraud.

BILL for tithes of corn on an allegation, that when the plaintiff came to fetch it away from the field where it grew, he found none there, the defendant having removed it to some other place, which the plaintiff insisted was contrary to law, and a subtraction of the tithes. The defendant alleged, by his answer, that when the corn was ripe he cut it, and the fences being bad, he removed the whole crop into the adjoining field for greater security, and then (after notice given in church) he tithed it, and no one coming to receive the tithes, he took care of it for four or five days, after which it perished on the ground. He insisted that such removal

(g) Note, *Mr. Ambler*, in his Reports, states, that the bill was dismissed as to the agistment-tithe. But in this he is mistaken, as appears by the Registrar's Book.

was not fraudulent, nor done with design to subtract the tithes, but purely to preserve the corn, and he hoped he should not be obliged to answer the tithes over again. The court, upon the hearing, were of opinion, that the removal was unlawful, and decreed defendant to account.

P. 20 Geo. II. A. D. 1747. In Canc.

Thomas Carte, Administrator of *John Carte*, late Vicar of *Hinckley*, in the County of *Leicester*, Clerk, deceased, v. *Robert Ball*, *Thomas Taylor*, *Thomas Shewell*, and others, Occupiers of Lands in the Parish of *Hinckley*, the Dean and Chapter of *Westminster*, ImproPRIATORS of the said Parish, and *Frances Trotman*, their Lessee.

THE plaintiff's bill stated, that by some ancient endowment, usage, or prescription, the vicars of *Hinckley* were entitled to, and ought to have received all tithes (corn and hay as well as small tithes) whatsoever yearly arising within the township or hamlet of *Hydes*, part of the parish of *Hinckley*, and charged, that such tithe particularly appeared to belong to the said vicars, by a certain terrier of the parish, dated in 1638, and signed by the then vicar and churchwardens. That the defendants, the occupiers, had, during the whole of the said *John Carte*'s incumbency, (*viz.* from 1720 to 1735), holden divers lands in the hamlet of *Hydes*, and had reaped therefrom great quantities of corn and hay, and had carried away the same, together with divers quantities of small tithes, without having made any satisfaction for the same to the said *John Carte* during his life. The bill therefore prayed, that the defendants, the dean and chapter, and their lessee, might admit the title of the vicar to all the tithes arising within the hamlet of *Hydes*; and that the other defendants, the landholders, might be decreed to account with the plaintiff for the several tithes aforesaid.

The defendants, the occupiers, said, they did not believe the plaintiff was entitled to all tithes whatsoever in kind, either within the precincts of *Hinckley* in general, or within the hamlet of *Hydes* in particular; but insisted, that a yearly *modus* of 17 s. was payable to the vicar, in lieu of the tithes of the hamlet of *Hydes*, in manner following, *viz.* by the defendant *Ball* 6 s. 3 d. by the defendant *Shewell* 5 s. 1 d. by the defendant *Stakes* one third, and

1747. by the defendant *Taylor* two thirds, of 5 s. 8 d. yearly, making, in the whole, 17 s. a-year.

The defendants, the dean and chapter, admitted that such terrier as that charged in the bill might exist, but insisted, that it was of no validity, the same having been contrary to the usage in the said parish before and since its exhibition: and further insisted, that queen *Elizabeth* being seised of the manor, rectory, and parish of *Hinckley*, and of all manner of tithes, both great and small, yearly arising within the said parish, and of the advowson of the vicarage thereof, did on the 21st day of *May* in the second year of her reign grant to the said dean and chapter and their successors, the said manor, rectory, and church, with all their rights, members, and appurtenances, tenths, oblations, and profits whatsoever; by virtue of which grant they were seised of all manner of tithes, both great and small, yearly renewing within the said parish.

The defendant *Trotman* said, that the dean and chapter did, by an indenture bearing date *Jan. 12, 1737*, (two years after the death of the late vicar, *Carte*, in whose right the plaintiff claimed) grant to her (for the lives of three persons, all then living) all manner of tithe-corn, &c. of the parish of *Hinckley*; but that she had never received, or claimed any right to the tithes in question, and was willing the plaintiff should enjoy the same.

At the hearing of the cause there appeared no proof whatever (save the admissions of some of the defendants as above stated) that the vicars were originally endowed with the tithes demanded by the bill; or that they had ever received any tithes whatever, either in kind, or *sub modo*, within the rest of the parish.

It was decreed by the lord chancellor, that the parties should proceed to a trial at law on the following issue "Whether the said *John Carte* was, in his lifetime, entitled to take all manner of tithes, as well great as small, arising within the hamlet of *Hyde*, or any, and what, part of such tithes?" with liberty to indorse the *posse*, in case it should be found on such trial that the said *John Carte* was entitled to some parts of the said tithes, and not to the whole.

The jury found a verdict against the plaintiff.

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Tr. 20 & 21 Geo. II. A. D. 1747. Scac.

The Vicar of *Kellington*, in *Yorkshire*, v. The Master and Fellows of *Trinity College*, in *Cambridge*, Rectors, their Lessee, and Two Occupiers of Lands, in the Parish. [1 Will. 170.]

SIR *Thomas Parker*, Lord Chief Baron.—This is a bill brought by a vicar for the tithe of agistment of barren cattle, setting forth, that he is entitled by endowment, prescription, usage, or otherwise, to all small tithes within the parish; and to make out his right thereto, he has produced in evidence an antient survey (from the first fruits office) of the possessions belonging to the nunnery of ——— without the walls of *York*, to which this rectory was appropriated; which survey was taken in the year 1563, upon the dissolution of monasteries *tempore H. 8.* whereby it appeared, what species of tithes belonged to the rector, and what to the vicar, *viz.* corn, grain, and hay to the rector, and to the vicar, wool, lamb, and all other small tithes; also, another survey taken by the college *anno 33 Eliz.* was produced, which agreed with the former. It was objected, that it does not appear by what authority the survey in the year 1563 was taken. The answer is, that these surveys have always been allowed, as proper evidence, and to be read, notwithstanding the commissions, under which they were taken, be lost. It has also been objected, and it appears in proof, that agistment tithes have been paid to the rector for fifty years last past. In answer to this it is proved, that before that time, *viz.* sixty years ago, this species of tithe was paid to the two vicars; so that I am of opinion, here has been a usurpation upon the vicar for fifty years last past. If an endowment appears, that is the rule we are to go by; if it doth not, usage is the rule; therefore, if there had not been this written evidence, to be sure, the payment to the impropiator for fifty years would have been very strong proof for him against the vicar; but on the other side, here is a record which proves that the vicar is entitled to all small tithes, and at this day there is no doubt, that agistment-tithe is a small tithe. The court therefore decreed in favour of the vicar.

Survey of a religious house taken in 1563, allowed good evidence to prove a vicar's right to small tithes.
2 Wood's Decr. 442.
S. C.

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Tr. 20 & 21 Geo. II. A. D. 1747. In Causa.

Ekins v. Dormer. [3 Atk. 534.]

A grant from queen Mary of *decimas bladorum & feni & omnes alias decimas*, these general words are not sufficient to bar the rector of his common right of tithes, unless expressly stated what was the right of the crown.

LORD Chancellor.—The bill was brought for tithes in kind of hay of a moiety of the manor of *Skipton*; but it comes in an imperfect manner before the court. The plaintiff, as rector, is entitled to all tithes, unless there is some bar, as a *modus*, composition, &c. The question here is as to a moiety of the privy tithes of the demesnes of a manor, and the tithe-hay, whether the rector is entitled in point of permancy to the whole, or the defendant is entitled to this moiety as well as to the tithes of corn and grain under a grant from the crown, the first year of queen *Mary*, in which were these general words, *decimas bladorum & feni & omnes alias decimas*.

I do not think any stress can be laid on those general words, and take them in their utmost extent, they are not sufficient to bar the rector of his common law right, unless it had been expressly stated what was the right of the crown; and in making out the grant, the drawer might probably, at the request of the grantor, put in these general words. There is no pretence of payment of the privy tithes to the lord of the manor. I am of opinion these general words are by no means sufficient to shew a right in the defendant against the rector.

The next question is as to the two *moduses*. The first objection was, as to the manner of introducing them in the cause, for that in respect to the cross-bill they are not set out with any certainty. And to be sure they are not, and therefore the cross-bill must be dismissed: but a different consideration arises upon the original bill; notwithstanding the particular *moduses* are not mentioned in the bill, nor particularly pleaded by the answer, yet as the plaintiff's own witnesses shew a reasonable ground for a *modus*, it would be going too far to say that an account of tithes should be decreed, where even upon the plaintiff's evidence it appears there is a *modus*. I am of opinion therefore the court is bound to take notice of the two *moduses*, the 10 s. for hay, and 5 l. for the privy tithes of the demesne lands.

As to the first, it is mentioned to be a *modus in decimando* in the receipt for it from the parson; but the receipt for the 5 l. calls it a composition. It has been said, that the *moduses* are too rank, and that

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that the 10 s. for hay particularly are so, because the *modus* for the tithes of corn is but 33 s. No argument at all is to be collected from thence, because less might be in tillage at that time than there is now. The objection is stronger as to the 5 l. for the privy tithes of the demesnes. Undoubtedly it is a pretty large sum, and it has been insisted the whole value of the manor is but 15 l., as appears from an ancient survey in *Henry* the eighth's time, where it is called *firma* of *Shipton*, which implies a rent reserved. But I can no more infer from thence, that this was the value of the rack-rents of the manor in *Henry* the eighth's time, than I can at present the real value of a bishop's manor from the rent reserved in a lease of it. In a case that came by appeal to the house of lords in lord *Talbot's* time relating to the parish of *Chedingford* in the county of *Surry*, the lords reversed a decree of the court of Exchequer for being too hasty in rejecting a *modus* as too rank, and said, it was taking too much upon them to determine it to be no *modus* upon such kind of evidence, which was not conclusive evidence against a *modus*, and directed an issue to try it.

Another objection was, that the 5 l. is no *modus* at all, for in the receipt from the parson it is mentioned to be an ancient composition.

I do not know the absolute distinction between an ancient composition and a *modus*; there may be a difference between a composition that is not beyond the memory of man and a *modus*, but unless something be shewn that breaks in upon the immemorialness of it, it is synonymous with a *modus*.

There is indeed a difference between a real composition and a *modus*; for a real composition is, when an agreement is made with a parson or vicar, with the consent of the patron and ordinary, that such lands for the future shall be discharged from the payment of tithes in specie, by reason of a recompence made to the parson or vicar for them out of other lands; but a *modus* is nothing more than an ancient composition between a lord of a manor and the owners of the land in a parish and rector, which gains strength by time.

I am of opinion here is a considerable foundation laid before the court for the two *moduses*, the one of 10 s. and the other of 5 l., and therefore the court cannot decree an account of tithes where there is no objection in point of law against the *moduses*, nor any

1747. pretence there have ever been tithes in kind received within the memory of man, and therefore issues must be directed to try these two sums.

The plaintiff being in court, and declining to try the *modus* of 10s. for tithe-hay of the manor, and 5l. for privy tithes of the demefne lands, his lordship decreed an account of what was due for those annual payments.

M. 21 Geo. II. A. D. 1747. In. Canc.

Richards v. Evans, et e contra. [1 Vez. 30.]

Not necessary to use the word *modus* in laying it.

THE plaintiff, as rector, brings a bill for payment of tithes in kind: the defendant, as owner of the farm, brings a cross-bill for establishing a customary payment of 7 l. *per ann.* in lieu and satisfaction thereof.

The particular day of paying the *modus* need not be laid.

For the plaintiff. This *modus* is neither well laid nor proved, nor is the day of payment certainly specified, for want of which a *modus* was held not good in point of law in the Exchequer, *Trinity term*, 5 G. 1. because the time of payment of a *modus* ought to be as certain as of the tithes in place of which it is substituted; which as to the fruits of the earth is immediately on the first severance; and a custom uncertain is no custom. Then the payment of such a gross sum is an evidence against the *modus*, as too rank; for as every *modus* must be presumed to commence before the time of memory, this many years ago must have been very near the value of the farm: it is therefore rather a modern composition, or rent for tithes.

Lord Chancellor.—The objections to laying the *modus* are of no weight: for neither in law nor equity is there any necessity to use the word *modus*, as appears from all the cases on this head, as in *Cowper v. Andrews*, *Hob.* 39. *Shelton v. Montague*, *id.* 118. and 1 *Vent.* 3. it being only a technical term, not used in pleadings; in the stating of which lord *Hebart* was very accurate. The material words are so much money paid in lieu and satisfaction of tithes. As to the general question, whether it is necessary to lay and prove a particular day of payment; the case in the Exchequer was certainly so determined; but I remember that it gave general dissatisfaction in *Westminster-hall*, and abroad, as too nice to require the proof

proof of a particular day ; and it has been since adjudged to the contrary that “on or about” is sufficient ; so that they have left off taking that exception in the Exchequer. Then it rests on the merits : and that depends on the evidence on both sides, which is of two kinds ; first, of the fact and usage of payment ; secondly, such as arises from the nature of this *modus*. If it turned on the first, it is the strongest evidence I ever knew, against payment of tithes in kind, for which there is no proof on the part of the rector : that indeed, being only a negative, would not prevail to take away the common right that is in the rector, if there was nothing more ; but in support of the customary payment, there is the evidence of some terriers which makes a distinction throughout between this and other parts of the parish, where tithes were paid in kind : and there is the rector’s own admission of this. As to the remaining objection to the *modus*, arising from the nature of it, as too rank, several, indeed, have been overturned on this point ; but the distinction taken for the defendant is material, that a *modus* may be overturned for rankness, even at the hearing of the cause, where it is for a specifick thing, as a lamb, &c. because the price of the thing may be found from history and ancient records. But that is an objection from a fact, which, because it appears with such a degree of certainty, the court determines without sending it to be tried. But, where it is not for a specifick thing, there are several other circumstances to be taken into the consideration of rankness ; as the difference of value in the course of time. The house of lords therefore sent a case of this sort to be tried without over-ruling it. If this had come singly upon the rector’s bill, it should, without any scruple, be immediately dismissed ; for that would not have hurt the succession ; nay, it would be open to the rector himself ; but the owner bringing a bill also to establish a *modus*, that would bind the successors in the parish, and it being of consequence, that a great part of the evidence arises from the rector’s own admission, if the defendant insists on establishing it, the rector (unless he submits to the decree) shall have an opportunity to try it at law.

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M. 21 Geo. II. A. D. 1747. In Canc.

Bell v. Read. [3. Atk. 590.]

Plea of a former suit pending for the same matter, allowed to a bill in Chancery for an account of tithes.

THE plaintiff, as rector of *Blunfden* in *Wiltshire*, brings his bill against the defendants, as occupiers of lands in the parish, for the great and small tithes, and prays that they may come to an account with him for the tithes which are due and payable to him, and that they may pay to him all and singular his tithes and duties for the future, as they shall accrue and grow due, as long as he continues rector there.

The defendants, as to so much of the bill as seeks any account or discovery of the tithes arising in *Blunfden* at any time before the 28th of *April* 1746, plead, that before the plaintiff exhibited his present bill, he, in *May* 1745, exhibited his first bill against the defendants for an account and discovery of the tithes arising in *Blunfden*, and by that bill prayed, that the defendants might pay the plaintiff the full value of such tithes with which the defendants were chargeable, and which should appear to be due to the plaintiff, and also that the defendants might pay to the plaintiff all his tithes for the future as they should grow due, so long as he continued rector of *Blunfden*; and on the 28th of *April* 1746 that cause was heard before the Master of the Rolls, and it was ordered to be referred to Mr. *Bennet*, to take an account of what was due to the plaintiff from the defendants for all the tithes demanded by the plaintiff's bill, and that they should pay him what should respectively be found due from each of them. And in pursuance of the decree the plaintiff has left with the master three distinct charges against the three several defendants, and examined witnesses in order to support his charges, and also exhibited interrogatories before the master for the examination of the defendants, who have each of them put in their several answers and examinations to the interrogatories. And, in regard the plaintiff is by his present bill seeking the same relief and discovery as he sought by his former bill, and as is already provided for him by the decree, according to the usage of this court in cases of this nature; the defendants do therefore

plead

plead the former bill, answers, decree, &c. in bar to so much, 1747.
and such part of the plaintiff's bill as aforesaid.

Mr. *Tracy Atkyns*, in support of the defendants plea said, that the second bill must either be brought for vexation merely, or proceed from ignorance, and want of knowing the practice of this court; for he apprehended there was a material difference between the decrees of the Exchequer for an account of tithes, and the decrees of this court; that there, they are directed to the time of filing the bill only, but here, to the time of the master's report.

That Lord Chancellour seemed to be of this opinion in the case of The Archbishop of *York* against Sir *Miles Stapleton* and others, *February* 21st, 1740; "That was a bill brought for an account of tithes, and to establish the custom of setting out corn in stacks; his lordship directed an issue to try the custom, and said, though it will be time enough to search for precedents as to the manner of directing the account, when the cause comes back after trial, yet he took the difference between the course of proceeding in the court of Chancery and the court of Exchequer to be this, that there, they direct an account of tithes no further than the bringing of the bill; but here, the rule of the court in general is, where an account of tithes is decreed, that it shall be carried down even to the time of the master's report, and not to the filing of the bill only."

Mr. *Tracy Atkyns* observed further, that the rule is the same in similar cases, where the account is to be taken, and that in the case of * *Bulstrode* against *Bragley*, *Michaelmas* term 1747, lord chancellour was pleased to say, "It is the constant practice of the court in decrees against a mortgagee upon a bill for redemption, or against an executor to account, to direct it without future words; and yet if the person decreed to account receive any thing subsequent to the decree, it is inquirable before the master equally with sums received before the decree." * 3 Atk. 582.

That if this be the practice, the plaintiff, by the decree in the first cause, may carry the account full as far under the first suit, as he can under the second, and, consequently, the last is multiplying suits unnecessarily, without any advantage to the plaintiff, or answering any end, but what he has already, or might have, obtained under the former decree.

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Mr. Baron *Clark*.—The defendants plea of a former suit depending for the same matter ought to be allowed, otherwise he may be put to double expence and double vexation, as, possibly, if the second cause was to proceed, the decree might be different from the decree in the former suit.

As to the difference in practice between the two courts, the Exchequer and Chancery, it is undoubtedly such as has been insisted on by the defendants counsel, and in decrees for account of tithes in the court of Chancery, they are not drawn up differently from decrees to account in other matters, but are general, to account for all tithes that are due, without specifying any particular time charged in the bill, or limiting the account to any certain determinate time. And as, according to the practice of this court, an account for tithes may be carried on as long as the suit is depending between the parties; it would be vexatious if the plaintiff should be allowed to proceed in a second bill for the same individual tithes. I ought therefore to allow the plea as to the particular period of time covered by it, *viz.* to the 28th of *April* 1746, the time when the cause was heard and the decree made: and it was allowed accordingly.

M. 21 Geo. II. A. D. 1748. C. B.

Sanfom v. Shaw. [MSS.]

A custom that persons occupying meadow or pasture land in the parish, but not residing in it, shall pay 10 d. an acre yearly, and so in proportion for a less quantity, in lieu of all tithes arising on such land, is good.

THE plaintiff being sued in the spiritual court for an account of tithes in kind by the defendant, who was rector of the parish of *Wiberton* in the county of *Lincoln*, procured a prohibition to declare in. In his declaration he stated himself to be an inhabitant of the parish of *Great Hale* in the county of *Lincoln*, and owner and occupier of twenty-nine acres and three roods of meadow and pasture in the parish of *Wiberton*, which he had stocked and depastured with sheep and young barren beasts. He then suggested, that from time immemorial there had been, and there then was an ancient custom within the said parish of *Wiberton*, that every person holding or occupying meadow or pasture within the said parish being an *outner*, *viz.* an inhabitant of and in any other parish or place than the said parish of *Wiberton*, should pay to the rector of *Wiberton* for the time being, or his farmers of the tithes, 10d. yearly and every year at *Easter* for every acre of such meadow and

and pasture by him, her, or them so holden and occupied within the said parish, and so in proportion for any quantity of such meadow or pasture less than an acre, in lieu of all manner of tithes arising in and upon such meadow or pasture ground; and that all the rectors and their farmers of the tithes for the time aforesaid have accepted and been accustomed to accept, and of right ought to accept the said sum of 10d. Upon this *modus* issue was joined; and a verdict being found for the plaintiff, a motion was made in arrest of judgement.

Two objections were taken to this custom; 1st, That it was a rank *modus*, and could not have been time out of mind. 2d, That the custom was unreasonable and uncertain in excluding the towners, and not setting forth what they were to pay.

Belfield serjeant, in support of the *modus*, cited *Litt.* § 170. and 34 H. 6. 36. the prior of *Tikeford*'s case, to shew that prescription need not be carried back to the time of *Richard* the first, but that there may be a prescription by common law, as well as by the statutes of limitation of writs, *viz.* where the memory of man runneth not to the contrary, which was the prescription before the statute. As to the rankness of the *modus*, he said, he was so old as to remember almost the very beginning of the name of *rank modus*. Lord Chief Baron *Ward* was the first that introduced it. He was a great patron of the clergy, and carried their rights a great way. So was another great man that came afterwards from the Exchequer into this court.

Skinner serjeant, *contra*, cited the case of *Layfield v. Dewlapp*, Tr. 9 W. 3. in the Exchequer, from *Dodd*'s MSS. wherein a *modus* of 3d. for every lamb was set aside for rankness.

Willes, C. J. —If I thought there had been any difficulty in this case, I should have taken time to consider: but, as I think there is none, I shall desire to give my opinion now.

The first of these objections is, that the *modus* is too rank, and therefore cannot be so old as the time of *Richard* the first, the time of prescription, for that 10d. then would be 20s. now. It is said, and I am afraid truly, that there have been many cases determined upon this footing. The fewer, the better; but I am glad they are not in print, for then they might have mislaid more than they have already. I cannot agree to the objection that has been made to the cases cited out of the year books. I think of them, as I do of my brother who has cited them, that they are the better for their age. Brother *Belfield* is so happy as to remember the beginning of the

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doctrine of *rank moduses*. The reason of those determinations I cannot guess, unless it be that *boni judicis est ampliare jurisdictionem*. The consequence of them is to deprive the landholders of what they have fairly purchased and paid for. It is a strange notion, and most so in the present case. What is it founded upon? that it is not likely that the owners of lands would agree to pay more than the value of the lands. But we cannot go upon presumptions, but proof; and what proof is there of the value of lands in this country at the time of *Richard* the first; for this must be settled as well as the value of money; and 12 d. an acre has been given for land in *Northumberland*. I agree with my brother *Belfield*, that the time of *Richard* the first is not the time that we are to look to as the time of prescription according to *Litt.* § 170. that was the time of limitation of writs of right, and it would be absurd if otherwise. If the time of *Richard* the first was time immemorial in *Henry* the sixth's time, the time of *Henry* the sixth is immemorial now. And it would be more absurd to allow of this objection in this case; for how is it offered? not under the head of a void custom, but as fact against the verdict; and therefore this should not have been moved in arrest of judgement, but for a new trial.

Burnett, J.—The time of *R. 1.* is the time of memory so far, as that when the commencement of a custom or prescription must have been by grant; if the grant appears to have been subsequent to the time of *R. 1.* the prescription is bad; but it comes under the rule of *apices juris*. My brother *Belfield* has given us the history of the beginning of this doctrine of *rank modus* in lord Chief Baron *Ward's* time, and I have had another case given me by a learned judge, which shews the end of it. The case I mean is, the case of *Giffard v. Webb*, in the Exchequer. That was a bill for tithes in kind by the rector of *Stoke*, and the defendant set up a *modus* of 3 d. for every lamb fallen. It was insisted, that this would be equal to 30 d. now for every lamb, and was therefore bad. Yet it was decreed in favour of the *modus*, and the decree was confirmed in the house of lords upon an appeal there in 1735, and there was an end of *rank moduses*: I believe they have never been heard of since.

Supra 708.

The second objection as to the unreasonableness of the custom was likewise over-ruled, and the rule in arrest of judgement discharged.

H. 21 Geo.II. A. D. 1748. In Canc.

Rotheram v. Fanshawe. [3 Atk. 628.]

THE defendant instituted a suit in the ecclesiastical court for subtraction of tithes; the plaintiff, without pleading any discharge there, brings his bill in this court to establish a *modus*; the answer to the bill does not admit it; and the motion now is for an injunction to stay the proceedings in the ecclesiastical court, upon the bare suggestion of a *modus* by his bill.

The defendant in a suit in the ecclesiastical court for subtraction of tithes, brings a bill to establish a *modus*, and on the bare suggestion of a *modus* moves for an injunction to stay the proceedings in the ecclesiastical court. The injunction denied.

Lord Chancellor.—An injunction is prayed on two heads; first, on a presumption from a constant non-payment of tithe-hay time immemorial, that there must have been an alienation from the persons under whom the defendant claims, though the plaintiff is not able to produce the particular grant of those tithes to his ancestor. Secondly, upon a suggestion in the bill, that there has been a *modus* or composition constantly paid in lieu of tithes. If I should grant this injunction, I should make a precedent for tripping up the heels of two courts, the ecclesiastical court, and a court of common law.

The ecclesiastical court have a right to retain suits for tithes, whether at the instance of a spiritual person or lay impropiator. There may be a suit too in that court for a *modus*, as well as for tithes in kind. The defendant likewise may plead a *modus* there: if admitted, the ecclesiastical court may go on upon the *modus*; if denied, the ecclesiastical court cannot proceed *propter triationis defectum*, and if so, it is the common suggestion for a prohibition in the court of king's bench; but, if you go there for a prohibition, you must first shew the *modus* has been pleaded in the ecclesiastical court, and denied there. No such thing has been shewn in this case; but a bill is brought to establish a *modus*, and prays an injunction to stay proceedings in the ecclesiastical court, upon the suggestion of a *modus* only. I cannot grant an injunction here but upon the same grounds as a court of law would grant a prohibition *propter triationis defectum*. Injunctions in this court are granted upon a suggestion of something which affects the right or convenience of the party in the proceedings in the other court, or where there is a concurrent jurisdiction. The *modus* is not admitted by the answer to the bill in this court, and if insufficient

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1748. you may except to the answer; and even if the suit goes on in the spiritual court, and a sentence is pronounced for the tithes, it is no prejudice at all to the plaintiff in his suit depending here. But, if I was to grant this motion, I should take away the jurisdiction of the spiritual court on the one hand, and the court of common law on the other.

As to the non-payment of the tithe-hay, it is insisted, the owner of the land was formerly a purchaser of the tithes, and has enjoyed the land and tithes together for a great length of time, which is a presumptive evidence of his right. But this is not a ground for an injunction in a case of this nature. A lay impropriator is to be sure different from a spiritual in some respects: since the reformation, and the acts for dissolution of monasteries, tithes by grants from the crown are become lay fees; so that in fact lay impropriators have as much power to convey a portion of tithes as any part of the land itself: and therefore it was said, it is hard the plaintiff should not in this case have the same advantage of presumptive evidence from long possession in the case of tithes, as well as in any other case relating to an estate of inheritance; and it was a saying of lord justice *Hale*, he would presume even an act of parliament made in favour of length of possession: but the court of Exchequer in the case of *The Aldermen of Bury against Evans*,
supra 757. would not lay down a different rule as to prescribing in *non decimando* in regard to lay impropriators and spiritual persons, but held such a prescription equally bad against both.

Upon the whole, I do not see there is any reason at all for the injunction which is now moved. Why did not the plaintiff go upon the length of possession in the ecclesiastical court? he might have pleaded it there, as well as insist upon it here in his bill; and if the ecclesiastical court would not determine upon the same evidence as a court of common law would have done, it is the usual ground for a prohibition, and no other court has the cognizance of it but the court of king's bench (*h*), and therefore I will not make such a precedent, as by a side-wind will take away the jurisdiction of both courts at once. Lord *Hardwicke* therefore denied the motion.

(*h*) *Vide* 5 *Bac.Abr.* 648. 5th edit.

P. 20 Geo. II. A. D. 1748. In Canc.

Ex parte Croxall, Minister of the United Parishes of St. Mary Somerset, and St. Mary Mountshaw. [3 Atk. 639.]

THE petition prayed that the lord chancellor would issue his warrant for levying the sums of money mentioned in the petition on several inhabitants of these parishes, who had refused to pay the minister his dues according to an assessment in 1681.

It depended upon the construction of the statute of 22 & 23 Car. 2. c. 15.

The question was, whether the great seal has an authority under this act to issue such warrant as is prayed, if the lord mayor, upon an application to him, refuses to issue one?

The counsel for the petitioner, in support of the authority of the great seal, cited the case, "*Ex parte Savage*, rector of the united parishes of St. Andrew Wardrobe and St. Anne's Blackfryars; and *Ex parte Wood*, rector of St. Michael Royal and St. Martin Vintry," which came on before lord Harcourt on petition 29th October 1713, setting forth, "That the petitioners had respectively demanded of the inhabitants the respective rates and arrears for the houses, &c. in their respective occupations, but they refused to pay the same; and that the petitioners applied to Sir Richard Hoare, lord mayor, for such warrants as the act of parliament directed him to grant for levying the said monies, and he refused to grant such warrants; wherefore it was prayed, that his lordship would grant the petitioners his warrant to levy the several sums of money so respectively due to them, by distress and sale of such goods of the parties so refusing to pay, according to the directions of the act of parliament."

If the lord mayor has done wrong in refusing his warrant of distress for levying sums of money on the inhabitants, who denied the minister his due according to the assessment made in the year 1681, under the act of parliament passed 22 & 23 Car. 2. c. 15. for the better settling the maintenance of the parsons, &c. in the parishes of the city of London burnt by the fire; in this case the court of chancery, upon petition, can issue their warrant for levying the sums assessed.

Lord Harcourt thinking the matter of the petition of great consequence to the inhabitants of the several parishes mentioned in the act, as well as to the clergy of the city of London, as no such complaint since the making of the act had been before made to the lord chancellor, or lord keeper of the great seal, or to any two of the barons of the exchequer, desired the assistance of Mr. Baron Bury and Mr. Baron Price; and on 2d December following the matter

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came on again in their presence, when it appeared, that several of the quarterly sums claimed by the petitioners became due and in arrear when the houses, or other hereditaments, whereon such quarterly sums were assessed, stood empty, or were in the possession of former tenants or occupiers thereof; and a question thereupon arising, whether such sums so assessed upon the several houses within the several parishes mentioned in the act for making up certain annual sums of money to be paid in lieu of tithes, were become a fixed or real charge upon the houses whereon they had had been so assessed, so that the arrears which became due in the time of former tenants, or when the houses were empty, might be levied on the succeeding tenants; the further consideration of the petitions was adjourned to 23d *December*, upon which day the two barons certified their opinion, "That by the statute, the sums of money which have been duly, according to the directions of the act, assessed upon the several houses, &c. within the parishes in the act, are become real charges upon the houses, &c. whereon they were so assessed, so that the arrears, which ought to have been paid by the former occupiers of the houses, or which became due, when the houses stood empty, may be levied by distress and sale of the goods of the present occupiers." And lord *Harcourt* declared he entirely concurred in opinion with the barons, and that the petitioners were at liberty to apply to him for warrants of distress, as prayed by their petition; but directed them first to demand from the several persons mentioned in the petitions the respective sums due from them, that they might have an opportunity of paying them without further trouble or charge.

Lord Chancellor.—The act of parliament directs, "that the alderman of each respective ward within the city of *London*, wherein any of the said parishes respectively lie, and his deputy or deputies, and the common-councilmen of each respective ward, with the churchwardens and one or more of the parishioners of each respective parish wherein the maintenance is respectively to be assessed, to be nominated by such respective alderman, deputy, common-councilman and churchwardens, or any five of them, whereof the alderman or his deputy to be one, shall at some convenient and seasonable time assemble and meet together at some place within each of the respective parishes in such respective ward, wherein the maintenance aforesaid is to be assessed, and they, or the major
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part of them so assembled, shall proportionably assess upon houses, all shops, warehouses, and cellars, wharfs, keys, cranes, waterhouses, and tofts of ground, and all other hereditaments whatsoever, the whole respective sum by this act appointed, in the most equal way, that the said assessors, according to the best of their judgements, can make."

Another provision in this act is, that if any difference should arise in the assessment, and a parishioner should find himself aggrieved by the assessing of any sum of money in the manner aforesaid: "That then upon complaint made by the party grieved, to the lord mayor and court of aldermen, they summoning as well the party grieved as the alderman, and such others as made the assessment, shall hear and determine the same in a summary way, and the judgement by them given shall be final and without appeal."

After settling the manner of making assessments, and no appeals, then comes a clause that directs, upon refusal of the inhabitants of the respective parishes to pay to the respective incumbents any sum respectively payable, how the same shall be levied.

"That it shall and may be lawful for the lord mayor of the city of London, for the time being, upon oath to be made before him of such refusal, to grant a warrant for the officer appointed to collect the same, with the assistance of a constable, in the day time to levy the same tithes or sums of money so due and in arrear, by distress and sale of the goods of the party so refusing." Sect. 11.

Then comes the proviso which gives jurisdiction to the great seal.

"Provided that in case the lord mayor or court of aldermen shall refuse to execute any of the respective powers to them by this act granted, or to perform all and every such thing relating either to the assessing or levying of the respective sums aforesaid; that then it shall be lawful for the lord chancellor, or lord keeper of the great seal for the time being, or any two or more of the barons of his majesty's court of exchequer, by warrant under his or their respective hands and seals, to do and perform what the said lord mayor and court of aldermen, according to the true intent and meaning of this act, might or ought to have done, and by such warrant either to empower any person to make the respective assessments, or to authorize the respective officers appointed to collect the sums aforesaid, to levy the same by distress" Sect. 12.

1748. distress and sale of the goods of any person that shall refuse to pay in manner and form aforesaid."

I must take it here as if the assessment was made. The authority of the great seal does not extend to every case under this act; but only where there has been a refusal by the lord mayor, &c. to execute the powers granted to them: there, the lord chancellor, or, &c. for the time being, is to issue a warrant, &c. Here, the lord mayor has heard the parties, and is of opinion not to grant a warrant.

In the one case, the act did not intend to leave the minister so far in the power of common-councilmen and churchwardens, as to abide by their determination, but he has his appeal; and it does not only give an appeal to the minister, but to the inhabitants; for the words are "if any variance or difference in the assessment, and a parishioner shall find himself aggrieved, &c. and lord mayor's determination is final there."

In the other case, where there is no controversy about the assessment, but a refusal to pay, though the words are "shall and may be lawful," yet that is imperative upon the lord mayor, if a just demand. In case of any variance or difference in the assessment between the minister and parishioners, and appeal to the lord mayor, the court of chancery or exchequer have no jurisdiction, unless the lord mayor refuses to take cognizance, because that would be refusing to execute their own power; but, if they have entered into the consideration of the grievance in any manner, their appeal would be final. In the present case the only act the lord mayor was to do, was to issue a warrant; he has refused it; and unless I enter into the question, whether the lord mayor ought to have issued a warrant, I can never judge whether he had a power to do it or no. Here is, as it appears to me, a plain distinction in the act of parliament; for this warrant must have been founded upon an assessment; and as to the parishioners, if the lord mayor had issued a warrant improperly, an action of trespass would have lain against him, and that might have been his reason for refusing it.

Upon the whole, I think this court has a jurisdiction to inquire, whether the lord mayor has done right in refusing the warrant; and if of opinion he has done wrong, I can issue my warrant for levying the sums assessed; and his lordship gave directions accordingly.

There being a dispute, whether part of the premises were liable to the assessment, by consent of all parties, the court referred the decision to arbitrators.

Tr. 21 & 22 Geo. II. A. D. 1748. Scac.

Macgill v. Le Strange. [2 Wood's Decr. 452.]

THE bill stated, that Sir *N. Le Strange* and his ancestors had, for many years past, been seised of all the lands in the parish of *Ringstead Parva*, otherwise *Barrett Ringstead*, otherwise *Ringstead St. Andrew*, in the county of *Norfolk*, and also of the advowson of the rectory of the said parish; that the said parish being of a small extent, and having but few inhabitants, by reason that great part of the lands had been turned into sheep commons, the defendant and his ancestors for a long time neglected to present any rector to the parish, and took all the tithes arising therein themselves, or let the same to their tenants, but had provided no person to serve the cure during all the said time, whereby the cure of souls, and the performance of divine service, had been for many years past totally neglected, the parish church thereof greatly ruined and gone to decay, and the right of presentation lapsed to the crown; that the plaintiff thereupon, by virtue of a presentation dated the 6th of *May 1720*, was lawfully instituted, &c. therein, and is thereby entitled to receive all the tithes, both great and small, arising in the said parish; and that the defendants *Crawford* and *Mason* held land therein, which they rented of the other defendant, on which, grain, hay, grass, and other tithable matters grew, which they had taken and converted to their own use, without setting out the tithes thereof, or making the plaintiff satisfaction for the same; and which they had, under several pretences, refused to do. The bill therefore prayed that the defendants might account with and satisfy the plaintiff for all the said tithes.

The defendant *Le Strange* by his answer said, that the plaintiff seemed to confound the parish of *Ringstead St. Andrew* and the place called *Ringstead Parva* or *Barrett Ringstead*, as if they were one parish, whereas they were two distinct and different parishes and parish-churches, the one called *Ringstead St. Peter* and the other *Ringstead St. Andrew*; that he, the defendant, was seised of some estate in the parish of *Ringstead St. Andrew*, but not of all the lands there, nor of the advowson of the rectory of the said parish, which belonged to the master and fellows of *Christ College* in *Cambridge*;
that

1748. that *J. Baines*, clerk, was then the incumbent thereof; that there was a place adjoining to *Hunstanton*, called *Ringstead Parva*, or *Barrett Ringstead*, which was not a parish of itself, and had never been known by the name of *Ringstead St. Andrew*; that neither he nor any of his ancestors had ever presented any rector to the said place; but he insisted, that they had a right to the tithes arising within the said district, they having for several hundred years received or let the same. He denied that there was within the said district any parochial church, or that the crown had any right of presentation to the same before the plaintiff obtained the same under the great seal, if in fact he had so obtained it, as in the bill is mentioned; or that he knew, except from the plaintiff's suggestion, that he was presented to the same; but he admitted, that within the said district there stood the remains of a small edifice, called *The Chapel Barn*, which formerly lay as a ruin, until one of his, the defendant's, ancestors set up a thatched roof thereon; that since that time it had been used as a barn, though in ancient times it might have been a chapel within the said precinct, where there have not been above one or two inhabitants at the same time for many years past; that it appeared by ancient writings, that the said edifice was frequently stiled *libera capella*, and sometimes *libera capella five rectoria de Ringstead Parva*. He also said, that about the reign of *H. 8.* the said chapelry and rectory, with the tithes and profits thereof, became improper, and that the same had ever since been reputed and stiled a free chapel or rectory improper, and had been accordingly held and enjoyed as a lay fee and inheritance, without any claim or interruption by any person whomsoever until the pretended claim of the present plaintiff. He denied that there was, during any part of the said time, and until the claim of the plaintiff, any chaplain, rector, or incumbent presented to the said free chapel or rectory, or that any person had, as such, officiated, taken, or received any tithes, or in any respect performed divine service there; or that the said rectory consisted of two mediocrities, which were afterwards united; or that there were formerly, or at any time since, several rectors instituted to the said several mediocrities. He also denied, that at any time since the said free chapel or rectory improper became a lay fee, and the inheritance of his ancestors, or at any time since the thirty-first year of *H. 8.* the fabrick within the said district was used as a church or chapel, or that any persons had been admitted thereto, or had any way become incumbent

incumbent thereof, or of any mediety, or other parts thereof, or had received any tithes or profits thereout down to the time of the said plaintiff's presentation; or that his ancestors first began to take the tithes during the confusion of the late troublesome times; or that they were taken on account of their default in not presenting to the said rectory; or that he had in his custody any papers or memorandums whereby it might appear that there was one or more rectors of the said free chapel or rectory inappropriate in the reign of *Charles 1.* or in the troublesome times that followed that reign, or at any time since the thirty-first year of *Henry 8.* either of the name or family of *Le Strange*, or of any other name or family. He also said, that he did not know whether the said tithes were appropriated to any abbey, or whether the said chapel was at any time served by any stipendiary curate, or whether any curate thereof was paid by any abbey, or whether such free chapel or tithes, as part of the possessions of any such abbey, were, since the dissolution, come to him the said defendant. But he insisted, that the said free chapel and the tithes within the said district did, by lawful means, come to his ancestors, and legally descend to him; and he hoped, that after so long, quiet, and uninterrupted a possession, he should not be disturbed in his enjoyment of the same. He admitted, that he might affirm that there never was such distinct parish as *Ringstead Parva*, as he apprehended the said district might belong to the said parish-church of *Hunstanton*, forasmuch as the inhabitants of the said district, together with the other inhabitants of *Hunstanton* for time immemorial had, for all divine offices, repaired to the church of *Hunstanton*, and not for the default of his ancestors providing one to officiate in the said district of *Ringstead Parva*; and that the inhabitants of the said district, for all the lands lying there, had been taxed and assessed in the rates for the repairs of the church of *Hunstanton*, and in all other parish rates and taxes; and he denied that *Ringstead Parva* had been reputed to be a distinct parish from *Hunstanton*. He admitted, that the tithes arising within the said district had not been paid or satisfied to the owners of the tithes of *Hunstanton*, and that tenths, synodals, procurations, and other ecclesiastical duties had been paid for them separately.

The defendant *Mason* by his answer said, that he resided in *Hunstanton*, and that he had been for four years tenant to Sir *N. Le Strange* of lands within the said district of *Ringstead Parva* or *Barrett Ringstead*, and had paid him for the whole tithe thereof,

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when sown with corn, one bushel an acre, or money in lieu, at the then current price of such corn; that for the other parts which were not arable, being coarse bulby pasture, and reputed small tithes, he had paid tithes to the minister of *Hunstanton*, where he lived, and where his flock was kept. He denied that he knew that the tithes of the said precinct were due or payable to any other person than to his landlord or his ancestors until the plaintiff claimed the same; but he said, that he believed that the said precinct of *Ringstead Parva*, though not tithable to *Hunstanton*, did lie in the parish of *Hunstanton*, and that the owners and occupiers of all the lands within the same precinct had paid, and did pay, all rates and taxes for church and poor, and other rates to, and bear offices within, the parish of *Hunstanton*.

The defendant Sir *N. Le Strange* died, and the plaintiff filed his bill of revivor and supplemental bill against his son and heir at law, to whom the said estate descended in reversion after the death of his mother, whom he made a defendant thereto; and further set forth, that the defendant Sir *T. Le Strange* pretended that the parish church of *Ringstead Parva* was only a chapel of ease to some other church, for that he had found by ancient writings that the same frequently was styled *libera capella*, and sometimes *libera capella seu rectoria de Ringstead Parva*. The bill of revivor and supplemental bill therefore prayed, that the former proceedings might stand revived and the defendants might discover the said deeds.

The defendants appeared and answered, and the suit was revived by order dated the 2d day of *May* 1745; the plaintiff replied; the defendants rejoined; and witnesses were examined on both sides.

Mr. Jodrell's MSS.

The case appeared upon the evidence to be this. That before and at the time of the dissolution of monasteries there was such a distinct rectory: that it belonged not to any religious house, but one *Le Strange* was incumbent. Entries in the First-Fruits Office of this rectory, and the value of it, and several ancient institutions from 1308 to 1420 were also proved. The plaintiff had gotten a presentation under the great seal. On the contrary it was proved, that Sir *Thomas Le Strange* and his ancestors had enjoyed the great tithes of this rectory ever since *H. 8.* for which ancient accounts of the family in *H. 8.*'s time were produced. It was also proved, that vicarial tithes were paid to the vicar of *Hunstanton*, the neighbouring parish: that the inhabitants pay poors' rates and go to the church at *Hunstanton*: that there is no church or parsonage house at *Ringstead*, nor was any incumbent ever presented since *Le Strange*.

Lord

Lord Chief Baron delivered the opinion of the court.

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It appears plainly that there was once such a rectory. The question is, whether from the great length of time, either a union of this church with *Hunstanton*, or an appropriation to some lay patron, one of the ancestors of Sir *Thomas Lefrange* (the defendant) is to be presumed. There is not the least positive proof of any union. The vicar of *Hunstanton* is proved only to have enjoyed small tithes, and there never has been any rector to assert his right to the great. So that I do not see how there can have been any union since the time it appears to have been a distinct rectory. No presentation to this rectory, as would have been, if united, as well as to *Hunstanton*, *Cro. Eliz.* 500. As to an appropriation, there is no evidence of that. It did not belong to any abbey or religious house at the dissolution, for *Lefrange* was then incumbent. No vicar was ever endowed as required by the statutes of 15 R. 2 c. 6. 4 H. 4. c. 13. An appropriation must have been to some body corporate: it could not be to a natural person, much less to a layman, *Plowd.* 495. *Heb.* 307. Impropriators pay no tenths, 26 H. 8. The payment of tenths by the *Lefranges* is an evidence of their having the advowson, but not that they were impropriators. 12 Co. 3. 4. was cited, to shew that we ought to presume a rectory impropriate. Those cases were applicable if there were any traces of an impropriation; for there, there were traces of it, and a part only was presumed; but here we must presume the whole. That we cannot do this, *Cro. Eliz.* 873. is, I think, a case in point. Therefore as nothing appears either of a union or an appropriation, and it is very clear it was once a distinct rectory, we are all of opinion, that the plaintiff must have a decree for his tithes and costs.

Supra 136.
375.

Supra 222.

Tr. 21 & 22 Geo. II. A. D. 1748. Scac.

Ingram v. Thackston. [Mr. Joddrell's MSS.]

LORD C. B.—This is a bill by a vicar for tithes of a part of lands called *Bronley Grange*, formerly belonging to a monastery of *Cistercian* monks. The defendant, who is only occupier, says, that the closes were belonging to the monastery of *Fountains* at the dissolution; that the abbey or monastery was founded time immemorial, and one of the greater monasteries; that the lands were had never paid tithes, the court presumed an absolute, not a qualified exemption, though it was also on proof that the house was a *Cistercian* abbey; that other lands, part of the same farm, paid tithes, while in the hands of tenants; and that the lands in question were never in lease.

Where it was in proof that the lands in question belonged to one of the greater houses, and that they paid tithes.

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tithe-free at the dissolution of the abbey; that *H. 8.* became seised thereof on the dissolution exempt from tithes; that they have been held exempt ever since, and therefore he insists that they are exempt. It appears by the endowment that the vicar is entitled to these tithes, if the lands are tithable. The question is, whether this is a limited discharge while in the hands of the owner of the inheritance only? or, whether it is a general discharge in the hands of the occupiers also?

This question depends on the construction of the statute of
 Supra 385. 31 *H. 8.* It appears from *Slade v. Drake*, *Hob.* 296. 309. *Dy.*
 Supra 132. 277 *b.* & *ft.* 2 *H. 4.* c. 4. that there was a qualified exemption from tithes in the *Cistercians* only during their own occupation. It was insisted by the counsel for the defendant, that the discharge at the dissolution was absolute. *Hardr.* 101. *Dyer* 349.

The first objection that was made, that the abbey was not founded before time of memory, is false in fact. For it appears from *Dugd. Monast.* 375. 703. to be founded before the time of *R. 1.* The second objection was, that the *Cistercians* were not discharged till the council of *Lateran*. But there were two councils of *Lateran*, one before, and the other after time of memory. The third objection was to the pleading of the discharge. This form has prevailed many years in this court, and ought to prevail now. *Bowles v. Atkins*, 1 *Sid.* 320. & *Lev.* 195. is not a case depending on the statute of *H. 8.* What I rely on is this, that it is proved, that these lands have always been in the occupation of the owners, which is consistent with the plaintiff's case, that it is a discharge of the tithes by the order only; and therefore nothing but intendment from length of time to shew an absolute discharge. The evidence is, that these lands have always been in the possession of the owners of the inheritance, and have not paid tithes. If these lands had been proved ever to have paid tithes, it would have been clear for the plaintiff, *Lord v. Dupleck* and another, 7th December 1722, in this court. Here we must go on a presumption that the whole of *Bromley Grange* had the same discharge. But other parts of it in the hands of tenants have been proved to pay tithes; and this has never been in the hands of tenants at all. If indeed they had been so, and had not paid tithes, another exemption might be presumed. But here is no such proof, and therefore I think the plaintiff must recover.

Mr. Baron *Clarke*.—I think there is not sufficient upon these pleadings to let the plaintiff into the proof he has brought, as to
 other

other lands in the parish ; and I do not think proof of payment by other lands ought to affect these. There is nothing in the bill or answer which leads the plaintiff into proof of tithes paid in other lands part of *Bromley Grange*. If you go on presumption, you must go entirely on it here, and the matter is not put in issue, that other lands in the hands of occupiers paid tithes, so that the defendant could not make his defence. The bill is brought generally for tithes of the defendant's lands : the defendant sets up an exemption for his own lands only, and not for *Bromley Grange* in general. How then can the defendant be bound by a defence other persons have made for their lands ? Is he to be bound by their neglect ? I think we cannot take what has been done in other lands, as conclusive evidence to this. A discharge by real composition extends to laymen as well as ecclesiastical persons. *Fountains* abbey might have been endowed with these lands discharged by such real composition. So proving the abbey endowed by laymen with these lands does not prove they cannot be exempt. Why is not this to be proved, when no tithes have been paid for such a length of time ? This is given as a reason for a general discharge being pleaded by lord *Coke* in the *Archbishop of Canterbury's* case. I doubt whether we should go so far as to presume no other discharge in this case, but what arose from the privilege of the order. The statute of 31 *H. 8.* is strong to this purpose, and length of time is in favour of the defendant. I have often wondered how the distinction between occupiers and owners has been continued since the statute. For no personal privilege was intended to laymen by the statute, but an estate in that condition. However, this has been so determined. I think therefore that the plaintiff is not entitled to go into evidence of a fact not properly in issue ; and if he were entitled, I think it would be doubtful as to the evidence itself. I think therefore a general discharge in the owner of the estate is in the monastery.

Mr. Baron *Clive*.—The question is, whether this be a general discharge, or only a discharge in the owner's hands ? Presumption must hold chiefly in this case. The discharge of these orders did not arise from the council of *Lutetia* ; nor is it necessary that the particular discharge must appear in the pleadings, *Puge's* case, *Supra* 513. *Hardr. 322. Nash v. Molins, Cro. Eliz. 206.* As to this particular *Supra* 162. case, it appears that *Bromley Grange* belonged to the monastery, and that some of the lands there have only a personal discharge. The question is, whether that evidence will affect this case ? Non-pay-

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ment is a sufficient discharge in general. The *Cisterians* were capable of other discharges besides that of their order. I do not think it follows, because they had other lands that had a personal discharge, that these lands had no other discharge. Therefore I do not think this evidence good to affect these lands. And as there has been so long a non-payment, I think we must rather presume a general discharge, a different one from that of the other lands in *Bromley Grange*. I therefore concur in opinion with Mr. Baron *Clarke*.

Mr. Baron *Legge*.—The case is reduced to presumption one way or the other. It is proved that these lands were never in lease, and that other lands in *Bromley Grange* have only a limited discharge; therefore it is to be presumed that these have only such. I think there is a stronger presumption in favour of a general discharge. But then the evidence tends strongly another way. But then that is not particularly put in issue, for nothing is said as to the other parts of *Bromley Grange* in the bill and answer. It is not in issue, nor is the evidence applicable to this particular estate. I think therefore the general presumption is to prevail, that here is a total discharge, and I concur in opinion with the two other barons. Bill dismissed.

M. 22 Geo. II. A. D. 1748. In Canc.

Offley v. Fanshawe. [Mr. Joddrell's MSS.]

All the parishioners need not be parties to a bill brought to establish a *modus*.

IT was objected to a bill to establish a *modus* which was brought by three land-owners and their tenants, that the rest of the parishioners should have been parties, or that the bill should have been filed in behalf of them, or some reason given for their not being parties; and that this could not properly be called a bill of peace, because there was no disturbance of the right.

Lord Chancellor.—As to the first objection, it is not usual to make all the parishioners parties, nor is it necessary to set out that it is in their behalf; for that if a decree be made on such a bill, though the persons, not parties, be not actually bound by it, yet it may be given in evidence (unless shewn it was obtained by collusion) against any other persons claiming the same right.

As to the other objection, I do not think that a disturbance is a necessary ground for such a bill, unless some relief is prayed. I compare it to a bill to ascertain the customs of tenant-right estates.

Tr. 22 & 23 Geo. II. A. D. 1749 In Canc.

Steeckwell v. Terry. [1 Vez. 115.]

THE bill was brought by a rector, for payment of tithes in kind of three hundred acres of land.

By 2 Edw. 6. c. 13. lands in their own nature not fit for tillage, pay no tithes for seven years after improved: but if not fit for tillage, by reason of wood, &c. they pay tithes presently after improvement.

Two bars were set up; the first general to all the acres; the statute 2 *Edw.* 6. c. 13. by which waste ground, improved into arable or meadow, shall not pay tithes, till seven years after the improvement is completed; as to which, the case appeared, that the land in question was a common field for sheep, horses, and cows, but not fit for fattening them, being over-run with brushwood, briars, and other weeds; the parson was entitled to tithes of calves, milk, wood, &c. out of it, and it was proved to be worth 2 s. an acre before it was improved.

The second was particular to forty-eight acres, parcel thereof; as to which an agreement had been entered into between the defendant and the parson, and those who had right to feed on the common, for making an inclosure, and an act of parliament was passed for that purpose, by which they enjoy all their rights in severalty, as they did the right of common before. These forty-eight acres were allotted to the defendant in lieu of his common, and the question was, whether this was still covered by a *modus*, which had been paid for it before?

For the plaintiff—This land was not within the statute, for it must be *naturâ suâ sterilis*, 2 *Inft.* 656. and the cases there put, which are much stronger than the present, *Gro. El.* 475. 1 *Roll. Rep.* 345. 2 *Bulf.* 103. and 6 *Mod.* shew, that the statute intends only such land as was merely barren, and made good by industry; and if it yielded any profit before, as wood, &c. it is not within it; this ground yielded profit before, and cattle were kept on it; which could not be, if it was waste.

As to the *modus*, these forty-eight acres are of another nature, and not to be covered by it. If there is a *modus* for any thing, and a new part is added to it, that addition must be paid for: as, if a *modus* for two mills, and a third is added, the *modus* will not cover it; so, if for a garden, and any addition is made to it; if a buck and a doe are paid for a park, if disparked, tithes must be paid for it.

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For the defendants—This act was made to encourage agriculture by the not losing a tenth of the improvement. Although the land yield some fruit, yet, if barren *quoad agriculturam*, it is within the statute, which must mean such lands as are not fit for agriculture without considerable expence; as a recompence for which, this encouragement is given. Defendant has been at great expence in cleaning and improving this ground, and will not have the benefit of it, if to pay tithes the first seven years.

As to the agreement, the general view of it and of the act of parliament was, that none should be prejudiced, and that it should be exactly in the same situation as before, except that it should not be in common; but the construction contended for will give the parson, whose former right was preserved, what he had not before.

Lord Chancellour.—If there had been a suit in the ecclesiastical court, and defendant had pleaded the statute as here, and plaintiff denied that this was within it, there must, by the nature of their jurisdiction, have been a prohibition for want of a trial, and it would be afterwards tried. But this court is not so bound; it is to judge of fact as well as law, otherwise every *modus* must be sent to trial: but there are many decrees here, and also in the Exchequer, for payment of tithes for want of proof of a *modus*; for something should be laid to induce a doubt, otherwise it would be putting the parties to unreasonable expence. In this case, sound discretion should be used; for by too strict a construction, the court might bring a burthen upon the party improving, which would also tend to impoverish the church; for by these improvements livings are made better; and though the present incumbent was not capable of tithes for seven years, yet after that time the profit will be increased. On the other hand, it will greatly prejudice the incumbent to call land in some degree fertile, barren land; for he will thereby be deprived of his tithes. It must be guided by the determinations made on the act, all which have been agreeable to lord Coke's Comment, 2 *Inst.* 655. where the rule laid down is, if land is in its own nature so barren, as not to be proper for agriculture after it is improved, it shall not pay tithe: but, if, in its own nature, it is fit for tillage, but by reason of wood or other accidental circumstance, it was not turned into tillage before, upon the taking away that accidental circumstance, it shall pay tithes presently on being turned to tillage: for the act does not consider

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the expence; but that you may by possibility be paid, as by the timber, underwood, &c. But, if afterwards this land will not produce, unless dunged or chalked, the court has considered this as evidence of its being barren in its own nature, and not proper for corn, without additional improvement. It is admitted, that this land produced three crops of corn, without any thing but ploughing; but objected, that chalking will be necessary; and so it may be in the course of common husbandry. But the question is, what was necessary for the first crop? The way of arguing for defendant would throw the expence upon the first seven years; whereas the benefit is to continue for ever, There is an expence in gaining land from the sea: yet no seven years allowed, though overflowed time out of mind, because the benefit is lasting: but, if an additional expence is necessary to make it produce the first crop, seven years shall be allowed it: it is admitted, that this land is not barren, and there is much land, which can neither be called fruitful nor barren, that pays tithe.

As to the forty-eight acres, I am of opinion, that in this case they are covered by the *modus*. I admit the case mentioned, and that by disparking the *modus* is gone; and if the owner dispartks part, he shall pay the same *modus*, and also tithes in kind for what is dispartked, because it was paid in nature of a franchise, and not for lands. But, suppose the owner, with consent of the parson, dispartks some to be enjoyed as before: I should think it was the incumbent's intent, that it should be still enjoyed as part of the park, and no tithes in kind shall be paid for it; for otherwise the agreement with the parson would be useless. So, if this agreement had been between a lord of the manor and the other commoners, without the parson, and they had turned it into several ownerships, it would be liable to the right to tithes which the rector has over the whole parish. But here has been an agreement by an act of parliament, to which the parson was party; and although the recital uses only general words, yet it shews plainly the intention of the parties to be, that every person should enjoy his allotment in the same manner as he did the thing in lieu of tithes, and that was subject to the *modus*.

Let the bill therefore be dismissed as to the forty-eight acres; and as to the rest, an account be taken of the several tithes to be paid, and the plaintiff (except as to the proof of the *modus*) have his costs; for I never knew a decree for an account of tithes without costs, unless there was a tender.

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Tr. 22 & 23 Geo. II. A. D. 1749. Scac.

Cartbew v. Edwards. [3 Burn's E. L. 479.]

Parishioner ought to milk tenth meal of his cows in vessels of his own, at place and in manner he milks the other nine meals, and the person ought to fetch it away in his own vessels. Anib. 72. S. C.

EDWARD Cartbew, clerk, rector of St. Mewan in Cornwall, brought his bill in the Exchequer, (amongst other particulars) for the tithe of milk.

The defendant *Edwards*, in his answer, set forth, that the plaintiff having declared he would not send for or fetch the tithe-milk, he did order every tenth meal of his cows to be turned upon the ground, it not being usual or customary for the parishioners of the said parish to carry their tithe-milk home to the rector.

The court, upon hearing the cause, and ordering two decrees in the said court to be read, wherein *Dodson* was plaintiff, and *Oliver* defendant, did declare, that the defendant ought to have milked the tenth meal of his cows in vessels of his own, at the place and in the manner he milked the other nine meals, and that the plaintiff ought to have fetched it away in his own vessels.

The plaintiff also brought his bill for the tithe of the wool of lambs.

The defendant answered, that he apprehended no tithe of lambs wool to be due, the plaintiff having received the full tithe of the lambs in their wool. But, by the court, it was declared, that the tithe of the wool of lambs was due to the plaintiff; and decreed accordingly.

Note. It was also said by the court in this case, that *Easter* offerings are due of common right.

Tr. 23 & 24 Geo. II. A. D. 1750. In Canc.

Bagster v. Knollys. [Mr. Joddrell's MSS.]

Demurrer to a bill for the partition of great tithes over-ruled.

A BILL was brought for the partition of great tithes of several parishes in the *Ile of Wight* held by the plaintiff and defendants as tenants in common.

To this bill one of the defendants (*Knollys*) demurred, because tithes are incorporeal and indivisible in their nature, and because no partition could be made thereof in severalty, but by metes and bounds, which could not be fixed on the lands out of which they issue, without the consent of the owners of the lands; and placing such

such bounds independently on the metes and bounds of the several parishes must create great confusion; so that whether they were or were not indivisible in legal estimation, a court of equity ought not in such a case to decree a partition without the consent of all parties concerned, but leave the plaintiff to a writ of partition at law.

Lord Chancellour over-ruled the demurrer.

M. 25 Geo. II. A. D. 1751. In Canc.

Walton v. Tryon (i). [MS.]

LORD Chancellour.—This is a bill brought by the plaintiff, as rector of *Mickleham* in *Surry*, against *Lady Mary Tryon* and her Son, for an account and satisfaction of three species of tithes. 1st, Of the loppings of ancient Pollard oaks and alhes cut in a certain wood, called *Ashurst*, within the parish of *Mickleham*. 2d, Of beech wood, as well the bodies of the trees as the tops, felled in the same wood. 3d, Of rabbits bred and sold from a warren in the parish, called *Ashurst Warren*, of which the defendant *Mott* is tenant. This last is claimed as due by the local custom of the parish. The principal questions arise on the two first species of tithes demanded. Upon these there appears no great difference as to the fact.

No tithes are due of the lops and tops of ancient Pollard trees. The use to which wood is applied does not determine the right to tithes. Beech may be timber by the custom of a parish. Rabbits, may be tithed by custom.

Ambl. 130. S. C. 3 Burn's E. L. 452. 467. S. C.

It is agreed, that there is no copse-wood or under-wood in this piece of ground: that the oaks and alhes are *ancient Pollard-trees*, and so laid in the bill: that the beeches were of twenty years growth and upwards: that by far the greatest part was cut, corded, and made into billets or faggots, and sold for fire-wood; but one or two of the defendants witnesses swear, that some small part was made into posts and rails, and slabs, and some used for wheelwright's work.

The plaintiff has plainly proved, that in two former falls made in the time of his immediate predecessor *Mr. Lodge*, tithe was set out and taken of this wood; and that one of these was in 1712, and the other in 1727 or 1728. The defendants have not proved any particular falls of this wood in which tithe has not been paid; but they have proved, that in the years of the two falls proved by

(i) This case is copied from a manuscript in the collection of the Earl of Hardwicke.

1751. the plaintiff, Mr. *Charles Tryon*, then owner of the estate, lived in *Northamptonshire*, and that for other woods of the like kind in this parish tithes have not been paid, and that Mr. *Lodge* once brought a bill in the Exchequer (5 *Geo.* 1.) for tithes of loppings of oak, ash, and beech pollards in *Boxhill Wood*, and after answer suffered his bill to be dismissed, and paid costs.

As to these two demands, the plaintiff's bill is primarily founded on a general point, namely, that for all wood of the kinds mentioned in the bill cut and corded, or made into billets or faggots, and applied to the use of fire-wood or fuel, tithes are due to the rector; and that the use and application shall make the wood liable to tithes. But, though this appears to be the general point sought to be established by the bill; yet, I admit that as the plaintiff brings his bill as rector, entitled to all tithes *de communi jure*, if any other right appears for him in the cause, he will be entitled to have the benefit of it, and to have a decree for an account, so far as that right extends. But it is necessary to consider and determine this general question first, which is of great consequence to the owners of woods in this kingdom, especially in the counties, where the iron-forges exist. This has been argued upon the reason of the thing, and the authorities and precedents.

1. As to the reason of the thing.

It has been said, that there is no more reason why tithe should not be paid of wood, than of any other production of the earth, for it does *quodammodo annuatim renovare*. This will prove too much; for it will prove that all wood, whether timber or copse-wood, shall pay tithe; for they all increase or renew in the same manner. But, in truth, though wood does *annuatim crescit*, yet it does not *annuatim renovare*; for the latter term imports that the profit is taken every year, and the product renews again. But, notwithstanding that, at common law and by general right, copse-wood or under-wood is subject to tithe; because, from the nature of it, the law takes notice that it is to be cut, and let grow again in some certain course; and though that renewal is not annual, yet, in favour of the clergy, it is considered upon the same foot as an annual renewal, because it is an ordinary, stated renewal, like the case of saffron, which, though gathered but once in three years, answers tithes. But of timber-trees, from the nature and ordinary use of them, the rule is otherwise, and the law does not expect a stated course of falling either the bodies or the branches.

2. The

1751.

2. The *second* argument was, that these are tenancy-profits, and therefore should answer tithes : that a tenant for years and a tenant at will may take them. I answer, this makes no rule of tithes ; it varies in different countries by different usages and contracts. This doctrine would make the whole law and rule of tithes uncertain. In many places, the loppings of certain spiral trees, which are undoubtedly timber-trees in themselves, are allowed to the tenants ; yet nobody ever thought they were subject to tithes.

3. *Thirdly* it was argued, that it is reasonable the use to which the wood is applied should determine whether it be liable to tithe or not : that as copse-wood and underwood, which are usually cut for firing in an ordinary course of falls, are liable to tithes, it is equally reasonable that any other wood, cut for the same use, should be liable in like manner. But, if this should be admitted, I think it would be a dangerous innovation, and introduce such a confusion in the right of tithes, as would turn equally to the prejudice of the clergy as of the laity. Certainty is the mother of repose, and therefore in all cases of this kind, the law endeavours at certainty. The subsequent use of the thing, as it alters not its nature, cannot add to it a tithable quality, which it had not before. If it could, why should it not hold *vice versa* ? and if Hornbeam, or Maple, or Beech, where it is not timber by custom, should be occasionally applied to some uses of timber, as for small, slight repairs, why should not that exempt it from the payment of tithes ? But this was never heard of, and yet it is equally reasonable in the one case, as in the other.

4. It was argued further, that there are certain cases wherein the subsequent use of a thing shall determine, whether that thing is liable to tithes or not ; and no greater uncertainty or inconvenience can ensue in the one case than in the other.

1st, That wood cut to be burnt in the house of the parishioner within the parish is exempt from tithe.

I answer—But this is not of common right, but by *special custom* only ; and so it was holden in the case of *Norton v. Farmer* (k),
Gro.

(k) In that case a prohibition was granted to stay a suit for tithe of wood, upon a promise that the wood was spent in the plaintiff's house for firing, and it was shewn that the custom in the parish was, that the owners of any house and land in the parish, who pay tithes to the parson, ought not to pay tithes of wood spent for fuel in their houses ; and issue being upon this custom, it was found for the defendant ; and it was moved in arrest of judgement, that although it be found there was no such custom, yet the plaintiff ought

1751. *Cro. Car.* 113. and it operates by way of customary exemption, in respect of some satisfaction to the parson, which it lies upon the parishioner to shew.

2d, That, by the general rule of the law of tithes, cattle bred for the plough or pail shall answer no tithes; and there the use, after the breeding of the cattle, determines it.

I answer—But tithe of colts, calves, and lambs, is not a predial, but a mixt tithe, which the owner is not bound to set out on any particular spot, or at any particular time; and the parson receives a tithe of such as are bred for the plough or pail in another shape: he receives his tithe of them substantially, in the like manner as he does of other tithable things, by a tenth part of the profits, which the owner makes of them.

There are two material differences between these two cases and the general point which they are alleged to support. First, Both these cases operate by way of *exemption* of things liable to tithes in their own nature; one *absolutely by custom*: the other *sub modo by the common law*; calves and lambs are exempt from answering tithes at their dropping or weaning, because they render a tithe afterwards. But, I know no case, where things not originally chargeable with tithes in their own nature, shall become so liable by the subsequent use of them; for that would be to charge their nature. 2dly, The case of cattle bred for the plough or pail is of a *mixt* tithe. Tithe of wood is a *predial* tithe, and must be set out by the owner or occupier upon the land at the time of falling; and at that time it will in many cases be impossible to determine to what uses it is to be applied. The owner may sell it to a dealer, and it may not be determined to what uses it shall be applied, in a year afterwards, or a longer time. How then can it be set out? Besides, it will vary the law of tithes in different counties and places without any custom to vary it. In several counties (as, where the iron-forges are) and in others, where timber is plenty, but remote from waier-carriage (as in the wealds of *Kent* and *Sussex*)

ought not to pay tithes for wood spent in his house, nor for fencing-stuff for hedges, but *per legem terræ* ought to be discharged of them. But the court resolved, that it is not *de jure per legem terræ* that any be discharged of them; for it is usual in prohibitions to allege customs, as for a *hearth-penny*, or by reason of other lands whereof he pays tithes, that he is discharged of that tithe; but not to allege, that *per legem terræ* he is discharged; and the plaintiff here having alleged a custom, and being found against him, it was adjudged for the defendant, that a consultation should be granted. *Cro. Car.* 113. they

they cut down trees for fuel, which by the rule of law are timber, and in other places would be made use of for all the purposes of timber; and if this doctrine of the subsequent use and application was to prevail, it would constitute two different common laws of tithes, and introduce an unreasonable distinction, as well as confusion.

I thought fit to say thus much upon the reason of the thing, which has been so much contended for: but the law of tithes is a positive law, and therefore it is not so material to debate what would be fit to be settled, if it was *res integra*, as to consider what is settled. And I take the law to be settled, that of all timber trees, of the age of twenty years or above, whether they are timber by common law or by custom, no tithes are to be paid, either of the bodies, lops, or tops of such trees, for whatsoever use they are cut; with this exception, that is, in certain particular cases, *where a fraud is actually attempted upon the parson; or, from necessity to avoid fraud.* The general rule is declared in the statute *de silva cædua*, 45 E. 3. c. 3.

“At the complaint of the great men and commons, shewing by their petition, that whereas they sell * *their great wood* of the age of twenty years, or of greater age, to merchants to their own profit, or to the aid of the king in his wars, parsons and vicars, do implead and draw the said merchants into the spiritual court for the tithes of the said wood, in the name of this word called *silva cædua*, whereby they cannot sell their woods to the very value, to the great damage of them and the realm; it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath been used before this time.”

* *leur gros bois.*

This statute is declaratory of the common law, as appears by the last words, and by the opinion of *Belknap*, 50 E. 3. fo. 10. “that it was never known, that tithes had been paid of great trees and of timber.” This was but five years after the making of the statute. As to the statute of *Sarum*, cited by *Egerion*, solicitor general *arguendo* in 2 *Leon.* 80. as mentioned in *F. N. B.* 51 H. and in the *Register* 49. *Concordatum fuit ad Sarum*, &c. lord *Coke* in 2 *Inst.* 645. says, there is no parliament at *Sarum* to which that can be referred, except the parliament of 7 R. 2. twelve years afterwards; and that the rolls of this parliament have nothing to this purpose; and Mr. *Selden* in his *History of Tithes*, says the same thing.

1751. thing. And this was but an entry of one *Hurleston* a clerk in the chancery, and of no authority.

What are the requisites made necessary by this statute of 45 E. 3. to wood not being liable to tithe? 1st, The nature of it, *gros bois*, always understood of timber-trees. 2dly, The age, twenty years or upwards. But nothing is said of the use to which it is applied.

Supra 133. What hath been the construction of it? and what the judgements and decisions of the courts of law ever since the making of it, down to the case of *Greenway* and the earl of *Kent*? They have uniformly been, that where the tree is a timber-tree, either by common law, or by the custom of the country, it is free from tithes, both for the body, lops and tops. This is the doctrine laid down in *Molyn's case*, *Plowd.* 470. and it is observable, that the trees there are called *Pollengers*, which is the same as *Pollards*. But the court held horbeam not to be timber, unless by custom; and therefore held it liable to tithes; but made no distinction between *Pollards* and trees not *Pollards*. The same law is laid down *arguendo* in *Lyford's case*, 11 *Rep.* 48 b. In 2 *Inst.* 642, 643. these rules are laid down. 1st, That the statute uses the word *gros*, not *haut* or *grand bois*; and the word *gros bois* signifies specially such wood as hath been, or is, either by the common law or custom of the country, timber, and no other wood, though the trees are of the bigness of timber. 2dly, That if a timber-tree be *arida, sicca, et non portans folia, nec fructus in æstate, nec existens mœremium*, if cut down and converted to *fuel*, no tithe shall be paid thereof, for the inheritance that was once in it. 3dly, That where the body is privileged from paying tithes, the bark, branches, and roots, and the germins and branches out of those roots, of what age soever, being parcel of the inheritance, are exempted likewise. 4thly, That the age of *gros bois* or timber-trees must be twenty years or more, as the statute directs. These rules have not been contradicted since, except in the case of germins growing from the stools of trees, that have been entirely cut down; and this with reason; because great part of the copses or underwoods of the kingdom are germins from such stools of timberwoods, and it would deprive the clergy of tithes of many underwoods.

It was asked, what is the difference, whether the germins grow from the stools of trees entirely cut down, or from the tops of trees

trees, that have been headed and lopped? To this I answer, a very great one. For in the first case, there is no tree remaining whence they may derive the privilege; in the other, there is. 1751.

Consider the authorities.—*Ram v. Patenson*, *Cro. Eliz.* 477. *Supra* 165. In prohibition the question was, whether tithes should be paid of timber-trees that were long since *mortuæ*, *aridæ*, & *putridæ*, fit only for firebote; and the court held, that no tithes should be paid; because the trees in question being above the growth of twenty years were once discharged, and should therefore always be discharged; and also, that as the body is privileged, so are the branches. *Moore* 908. *Brook and Rogers*. In prohibition, the libel in the spiritual court appeared to be for tithes of the boughs of trees, surmising that the trees were *aridæ*, *cavæ*, & *in columnis putridæ*; but the court refused to grant a consultation, because the trees themselves, being timber above twenty years growth, were once privileged, and they held, that though a tree being once of twenty years growth, and never lopped, was after the twenty years lopped every ten or every seven years, tithes were not payable for the lops; but that if a timber-tree be lopped before it is of twenty years growth, and afterwards it be lopped every ten or seven years, tithes shall be paid of such lops; because it had never acquired the privilege. In the vicar of *Wainborough's* case, *Litt. Rep.* 148. the law is laid down in the same manner, and the same distinction taken.

Consider next the cases that have been cited against these authorities. 1. *Brownl.* 94. *Man v. Somerton*. Mr. J. *Tanfield* held that beech by the common law is not timber; but that tithe shall not be paid of beech above twenty years growth in countries where wood is scarce, it being there reputed timber. And he goes on, “*Silva cadua*, for which tithe shall be paid, is under the growth of twenty years; but tithe shall be paid for such wood as is not timber, which is above the growth of twenty years.” This is clearly law, but proves nothing in this case; because *silva cadua*, though suffered to grow forty years, being tithable in its nature, shall pay when cut. 1 *Lev.* 189. *Hawes v. Cornwall*. It was agreed *per totam curiam*, that wood usually cut for fire-wood, although it be permitted to grow to twenty-five years or more, shall pay tithes: and *per Wyndham*, “Pollards of fifty years growth shall pay tithe when felled.” This case was cited chiefly for the saying of Mr. J. *Wyndham*; but it is so short a note, and so imperfectly

1751. reported, and this saying not supported by any authority, that it is not to be relied on. The case is more fully reported in 1 *Sid.* 300. and there it appears, that the wood in question was coppice-wood. It is as follows:—"Upon a motion for a prohibition, it was affirmed by *Wyndham* and *Twisden* justices, and not denied, that if there be a wood, which has been commonly used as coppice, and the owner let it grow till it be forty years growth, as is sometimes done to carry it beyond the growth of twenty years, to the intent that no tithes may be paid, yet, when it is felled, it shall be liable to tithes; and a man shall not avoid the payment of tithes by that means, so long as the thing cut is intended to be employed as wood for firing. Also, if timber-trees, that have been usually lopped, grow *sparfim* in a wood, and are lopped when the wood is cut, these shall only privilege themselves, and the other wood shall pay tithes; but then the libel ought to be special, as was directed in the principal case." The only inference from hence is, that coppice-wood, being tithable in its nature, shall pay tithe; and the principal case seems to have been a case of fraud on the parson. But still a distinction was insisted on between Pollards and other trees of the timber kind; and that this saying of Mr. J. *Wyndham* is law; for that Pollards are not timber. But this is not true in fact of all Pollards. 1st, Pollards of twenty years growth before they have been lopped, having gained the privilege of timber, are privileged within the rules already established. 2dly, The bodies of many Pollards are good timber, and serve the uses of timber. 3dly, There is no more reason why a Pollard should lose that privilege, than a dotard, which is quite dead, and fit for nothing but fire-wood; and yet is holden to retain the privilege which it once gained.

I come now to consider the precedents in the Exchequer, which have been left with me, and are not in print. These will be found not easy to be reconciled. 1. *Briggs v. Martin*, Tr. 6 W. & M. *Supra* 542. This was a bill for the recovery of tithes belonging to the rectory of *Bromley* in *Kent*, of wood and broom made into bavins and sold. The court decreed an account to be taken for the plaintiff of the arrears due for the tithe of broom made into bavins, as also of the lops and tops of old Pollard timber-trees and Dotards, and wood growing in hedge-rows. Two things may be observed in this decree. First, It does not appear but these Pollards might have been lopped before they attained twenty years growth, and then they

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they never gained the privilege. Secondly, Old Dotard trees are included, which is contrary to all the authorities. 2. *Northleigh v. Collard* and others, *M. 6 W. & M.* determined the very next term. The plaintiff, as farmer of the rectory impropriate of *Walthamstow* in *Essex*, brought his bill for tithes of corn, grain, hay, and wood. He set forth that in 1693 and 1694, the defendants had cut and sold the loppings of a wood called, *The Sale*, without paying any tithes for the same. The defendants confessed they had made cuttings of several Pollards in the wood called, *The Sale*, which they had sold agreeably to former custom, having never heard of any such demand before the plaintiff's; and that they believed, that the said wood, as part of *Waltham Forest*, was not liable to tithe. The court, after debate, decreed an account for the plaintiff of the tithes of the wood in question (except for the lops of oak Pollards, (which were declared to be by law discharged of tithes), and the standills, called Black Coats and White Coats, being timber). This determination appears to be directly contrary to the former, if taken generally; but may be made consistent with it, by supposing that in this case the trees had attained the age of twenty years before they were lopped; and in the other, not. 3. The case of *Layfield v. Cowper*, 12th July 1698, is not very applicable to the present subject, but, as far as it goes, is an authority with the defendants. For there, the court was of opinion, after much debate, that the beech trees in question, being maiden trees and timber usable as such, the bodies, lops, and tops were all privileged by law from the payment of tithes. The next is the case so much relied on for the plaintiff, viz. *Greenway v. Earl of Kent*, *Hil. 1705*. The plaintiff, as vicar of *Walford* in the county of *Hereford*, brought a bill against the earl of *Kent* for tithe-wood cut and sold from the chace or coppice-wood in that parish in the years 1701 and 1702. The bill states that the greatest part of the wood was under twenty years growth, and sold for fuel, and that, by the custom of that parish, the owner of the wood is obliged to cord it at his own expence before he pays the tithes. The defendant admitted the plaintiff's right to tithe of coppice and under-wood, as it was separately corded and sold, allowing for the charge of management; but denied, that he had any right to the tithe of oak or other cord-wood of timber-trees of thirty years growth, or bark of the same not being mixed; that to prevent confusion, and to distinguish what was to pay tithe from what was tithe-free, he had laid the bark of oak of different

1 Wood's
Decr. 330.1 Wood's
Decr. 479.

1751. ages in separate heaps; that he had corded the coppice and under-wood and sold it to the iron forges, distinct from the lops and offal of such timber-trees of thirty years growth, as he had fallen; of which he had sold the best, and used the rest in building and repairs, agreeably to former practice. Lord C. B. *Ward*, and the Barons *Bury*, *Price*, and *Smith*, after long debate, took time to consider of their judgement till the next term; when it was decreed, that the plaintiff should be relieved for the tithes of all wood above twenty years growth, as well as under-wood, cut and corded, as laid in the bill, and for the bark stripped from the same; but not for any wood above twenty years growth, that was not corded; nor for the bark thereof. The court was divided in this cause; Lord C. B. *Ward* was of opinion against the plaintiff, and that the bill should be dismissed as to this demand. The Barons *Bury*, *Price*, and *Smith*, were for the plaintiff, and the decree was according to their opinion. I have informed myself of their reasons as delivered in court, particularly those of Lord C. B. *Ward* and Mr. Baron *Price*. Lord C. B. *Ward* made a very learned argument, in which he founded himself upon the settled rules and authorities, and I think his the better opinion. I have likewise had an opportunity of seeing the notes of Mr. Baron *Price*'s argument, who seems to have guided the court in that judgement. He says, first, that ancient statutes are not to be construed literally, but according to their intent; that by *gros bois* is not meant all wood that is large and above twenty years growth, but timber and such wood only as is employed in building. I take the ground of his opinion to have been, that though a timber-tree be above twenty years growth, yet, if it is not of a size fit for timber uses, and is, in fact, applied to other purposes, it shall pay tithes. But this is neither agreeable to the statute, nor to the common law. Secondly, He argues, that the statute of 35 H. 8. c. 17. has introduced a new rule concerning timber, and, consequently, concerning the tithe of wood, because it enacts, that *upon every fall of woods, standills of oak, ash, or elm, shall be left, and such standills shall not be cut down till they are of ten inches square within three feet of the ground, and that otherwise they shall not be cut under a penalty*. But the true meaning of that statute was to encourage and secure the growth of large timber fit for the building of ships and such other uses, by inflicting a penalty on persons felling woods without leaving such standills; but not to change the general nature of timber, or to derogate

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derogate from the statute of 45 E. 3. ; much less to affect the right of tithes. And Mr. Baron Price's opinion seems to me to be contrary to former resolutions and to the established construction of the statute *de silvâ caduâ*. For by that law there is *tempus constitutum*, and that time is twenty years growth. One may as well argue that a man is not of age at twenty-one years from his degree of sense, or stature, or bodily strength, as that a timber-tree shall not be deemed timber, and privileged from paying tithes at twenty years growth, though it is not cut for timber uses. No precedent has been cited from that court which has followed this determination in all this tract of years ; for that of *Biby and Huxley, Hil. 1724*, as far as it goes, is rather against it. The plaintiff's bill there was for an account of tithe of wood cut for fuel. The defendant answered, that all the trees, which he had cut and sold for fire-wood, were timber of twenty years growth and upwards ; that the trees, which he had pruned for the preservation of the wood, were likewise timber of the same age ; that being timber, all and every part of them were exempt from tithes. The court decreed an account for the plaintiff of tithes of wood, as demanded by the bill, except for oak, ash, and maiden beech-trees above twenty years growth, and beech-wood growing from the stools of maiden-trees. It was said, that Mr. Baron Price in the case of *Biby and Huxley* disclaimed the general principle now insisted on, and upon that occasion, the *Earl of Kent's case* being cited, said, it went upon some ground of fraud, and that the separation of the wood was a new practice, though this does not appear in the case. This case therefore appears to me to be anomalous, contrary to former resolutions, and not followed by subsequent ones.

² Wood's
Decr. 237.

But still, if these trees were topped and made Pollards before they attained the age of twenty years, and have continued to be lopped in the course of falls ever since, they will be liable to tithes. But this is a question of fact ; and before I come to that, I will explain what I meant by saying that tithe of timber-wood may be demandable *from necessity, to avoid fraud upon the parson*. It is this : if a man has a wood, which is properly copse-wood, with a few timber-trees in it of above twenty years growth ; and when he cuts his copse-wood, he makes a few loppings of these trees, and binds them up promiscuously together, so as it is almost impossible to distinguish and separate the one from the other, the parson may demand tithes of the whole. But then he must shew the

1751. special matter, that the timber-wood was so intermixt, that he could not do otherwise. *Cro. Eliz.* 347. *Buckburst v. Newton* (l). And this is right, because it is the owner's fault.

On the proofs in this cause it does not seem probable, that the trees were lopped before the age of twenty years. Evidence has indeed been produced for the plaintiff of two falls, one in 1712, the other in 1728; and it is agreed, that tithes were then paid. I allow that this is material evidence; but it is not sufficient for me to conclude the defendants. Will the plaintiff think it worth his while to try that question? It will be difficult to frame a proper issue; but, possibly, persons of skill in timber may be able, upon inspection and from the marks on the trees, to determine, whether they were lopped before twenty years growth, or not.

The *second* demand is for tithe of beech-wood. It is not disputed but that it was above twenty years growth. It depends then upon the question of fact, whether beech be timber by the custom of the country. The plaintiff has submitted to have this tried. It must be considered on what issue. It was insisted by the defendant's counsel, that it should be, whether by the custom of this particular parish beech is accounted timber. And in the case cited by Mr. Perrot, *Abbt and Hicks* (m), *Tr.* 6 *W.* 3. in *Scac.*

(l) Prohibition for suing for tithes of faggots of oak and elm, *cautelâ* making his libel for faggots, which were of beech and thorn, the defendant prayed a consultation, *ita quod* he should not meddle with the faggots of oak and elm, for otherwise the party, that maketh the faggots, may *per cautelam* put in a stick of great wood into the faggots, and so prejudice the parson of all the tithes of the residue. But the court said, if it be so, the party must shew the special matter *pro consultatione habendâ*; that the oak and elm are so intermixed that he cannot do otherwise, and pray a consultation as to that which was thorn and beech. And so it was done in *Molyn's* and *Dawe's* case, where such a special consultation was granted upon such special plea; but, as it is, he can have no consultation for any part. *Cro. Eliz.* 347.

(m) In that case the bill stated, that about twelve years since the plaintiff was presented, &c. into the rectory and parish church of *Whitcombe Magna* in the county of *Gloucester*, and entitled to all tithes; that the defendant, being possessed of a wood containing above half of the parish, and consisting chiefly of beech, hazle, maple, ash, and fallow, began, about twelve years since, to fell the same, and hath continued yearly so to do, the wood of which he had converted, in great quantities, into charcoal, and sold the rest for fuel and firing, the tithe whereof was yearly worth one hundred pounds.

The defendant insisted, that the wood consisted chiefly of oak, ash, and beech trees, and was upwards of two hundred years old; that the trees grew from the root, and not from any stock or shrub, and were generally converted into and used as timber, and therefore that he ought not to pay the tithe thereof.

A trial

Scac. it was so directed, whether beech within the parish of *Whitcomb Magna* is accounted timber, or not. I own, I at first doubted of this, and as the books speak generally of the custom of a county, or the custom of the country, I thought it extraordinary to confine it to so narrow a district. But there is warrant for this in law. *F. N. B.* 4to edit. 136. on the writ of waste says:—"It is not waste to fell seasonable wood, which is used to be felled every twenty years or within that time." In the notes upon that place, which are generally understood to be my lord C. J. *Hale's*, it is said, "Oaks cannot be said to be seasonable wood, which are passed the age of twenty years; but by custom in any place where there is plenty of timber, oaks under twenty years growth may be seasonable wood; and such custom may be alleged in the wood itself, without saying in tali villâ or hundredo talis habetur consuetudo; and he cites *Raft. Entries* 69.; but the folio is mistaken; for it is in title "*Waste*" 692 a. and the pleading is thus:—In *Waste* for cutting oaks, the defendant pleads *Actionem non, &c. Quia dicit quoddam quercus illæ fuerunt de crescentiâ infra ætatem viginti annorum tempore succissionis eorundem, et omnes quercus infra prædicti. 20 acras bosci a tempore quo non extat memoria crescentes seasonabiliter infra ætatem viginti annorum de crescentiâ earundem succidi consueverunt, per quod idem def. easdem quercus infra ætatem viginti annorum de crescentiâ earundem succidit et vendidit, prout ei bene licuit et hoc*

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¹ Wood's
Deer. 319.

A trial at law was directed upon this issue, "Whether beech, within the parish of *Whitcombe Magna*, is accounted timber, or not?"

The issue was accordingly tried by a special jury, and a verdict passed for the defendant.

In the month of *April* 1695, an order was then pronounced, that the bill, as to the plaintiff's demand of beech-wood, should be dismissed.

But the plaintiff's counsel insisted there were great quantities of maple, ash, and fallow growing in the said wood, which were tithable to the plaintiff; and therefore an account was directed as to the tithe of the said maple, ash, and fallow, and other tithable wood growing in the said wood not discharged of tithes by the verdict.

On the 30th *October* 1696, and before the said order was entered, the cause was ordered to be reheard upon the petition of the plaintiff, but not to impeach the verdict; and on the 19th *November* 1696, upon opening the pleadings, and reading the depositions of several witnesses on both sides, and after long debate of the matter, it is ordered that the bill should be, and was thereby dismissed as to beech-wood, unless the plaintiff could shew better cause.

The cause came on the 27th *November* 1696, to be further heard; when, upon hearing counsel, and reading several depositions, and on long debate, it was finally ordered and adjudged by the court, that the said bill should be, and it was thereby dismissed as to all and every matters and things therein contained, but without costs.

1751. *parat. est verificare, &c.* Replication, that the oaks were of twenty-one years growth, and traverses that they were under the age of twenty years.

I therefore think, that the issue should be, whether by custom used from time whereof the memory of man is not to the contrary, beech trees growing within the parish of *Mickleham*, are and have used to be deemed *timber*. This may be found according to the truth of the *case*, and will prevent any difficulty upon the precise limits of the place.

The *third* demand is for the tithes of rabbits. If any tithes of them are due at all, they can be demandable only by custom. Such a custom may properly be within a particular parish. Consider the evidence on both sides, and it will be found by no means certain and conclusive. On the part of the plaintiff no evidence has been shewn, that these tithes were ever paid in kind, and no *modus* is pretended. Four couple of rabbits, and 20 s. are proved to be delivered and paid. This is called a composition, and it is said, that other warrens in the parish pay compositions of a like kind. If this be so, tithes in kind must have been due. The evidence of the payment is of weight : part of it is made in kind, and part in money : this may be good by agreement or composition. There is likewise an entry in the former rector's, Mr. *Lodge's*, books for tithes of rabbits. On the part of the defendant, I do not lay much stress on the evidence about the *Home-warren*, for it has been diswarrened twenty years. The evidence of the *Bartletts*, that the 20 s. *per annum* were paid for the calves and lambs dropped on the warren is a sufficient ground for me to direct an issue upon.

I gave time to the plaintiff till the next term to elect, whether he would try any of these issues.

24 Jan. The plaintiff's counsel waved trying any issue as to the tithes of beech-wood and rabbits, therefore the bill was dismissed as to those without costs ; and an issue directed, whether the oak and ash Pollard trees in question were first topped before they were of the growth of twenty years or not, and a view ordered, and further directions reserved. But afterwards the plaintiff waved this issue also, and the whole bill was dismissed without costs.

M. 26 Geo. II. A. D. 1752. Scac.

Morden v. Knight.

THE rector of the parishes of *Cantley* and *Southwood* in the county of *Norfolk*, claimed the tithes of top wood cut from pollard trees not being timber, and made into faggot wood and billets.

Faggot wood and billets made of top wood cut from trees of above 20 years growth before they were made pollards, are not tithable.

The defendant said, that he was possessed of a farm and lands in the said parishes, and had cut and lopped several oak and timber-trees, part whereof he burnt in his family and sold the rest; that he did not set out the tithes thereof in kind, or make any satisfaction for the same, because the trees from which the said wood was cut were large trees, and used as timber in the said county, and were all of them at least above the growth of twenty-five years.

The court was of opinion, "that the said billets and faggots were exempt from the payment of tithes, for that the same were cut from trees of above the growth of twenty years before they were made pollards;" and therefore dismissed the bill, without costs.

H. 26 Geo. II. A. D. 1753. Scac.

Walton v. Tjers. [2 Wood's Decr. 483.]

THE plaintiff, as rector of *Mickleham* in the county of *Surry*, and as vicar of *Dorking* in the said county, claimed the tithes of hops on a hop-ground of ten acres and a half in *Mickleham*, and on another hop-ground of eighteen acres in *Dorking*; and prayed, that the defendant might be compelled to account for the tithe of all the hops which he had grown, gathered, and picked within the said parishes since the 25th of *March* 1751, and to pay the plaintiff what should appear to be due and owing to him upon such account.

Tithes of hops cannot be set out before the hops are picked and gathered from the binds.

The defendant admitted the plaintiff's title to the rectory and the vicarage, and said, that for five years past he had occupied two hundred and fifty acres of land in *Mickleham*, and for sixteen years past had been owner and occupier of eighty acres of land in *Dorking* and the tithable places thereof; that he planted *Home Field*, *Chapel Lands*, *Long Winters*, and other acres of land in *Mickleham* with hops in 1747, the same being always before then arable land;

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land; that in 1745 he had hops growing, for the first year, on the six acres and a half and seven perches in an open field, part of a farm called *Denbys* in the parish of *Dorking*, the same being always before arable land after the plaintiff became vicar thereof; that in that year he had offered to pay the plaintiff any reasonable composition for the tithes thereof, but that he insisted on taking the tithes in kind; that he thereupon desired to know how he should set them out; that the plaintiff said, that for that year only he should pick all the said hops, and that he would have all the hops measured, and would take every tenth basket, and that the defendant might think himself well off that he did not make him dry the tenth part of the said hops; that the defendant, well knowing that that manner of tithing would spoil the colour and bruise and damage the other nine parts of the said hops, and greatly lessen the value thereof for sale, took counsel's advice with respect to the due manner of setting out the tithe of the said hops; that his counsel gave his opinion, "that the tithe was by law to be set out by dividing, separating, and setting out every tenth hill in the hop ground, and by severing the binds of the hop plants in every such tenth hill from the soil;" but that the then impropriatrix of the rectory of *Dorking* declaring that the tithe of hops growing in the open grounds in that parish were great tithes, and insisting, that as such she or her lessees were entitled thereto, he, the defendant, did not set out his tithe of the said hops, apprehending that he could only be answerable for the same to such one of them as should be entitled thereto; but that she afterwards not insisting on the same, he offered to make the plaintiff a satisfaction for the same, and suffered him for several years to take his tithe hops in the said parishes for quiet sake by measuring the tenth part of all the hops growing on his said lands after they were picked, and by taking every tenth basket thereof to his own use. He admitted, that in the year 1751 he had hops growing on his aforesaid hop-grounds in both the said parishes; and insisted, that he did not gather, pick, carry away, sell, dispose of, or convert the same to his own use, without truly setting out the tithe thereof; that, on the contrary, he divided, separated, set out, and left the full tenth part of all the said hops, by setting out every tenth hill on which the hops grew, and by severing the binds or stems upon every such tenth hill from the ground or soil, and by leaving the said hops upon the binds or stems upon every such tenth hill upon the hop-poles standing thereon, so that the hops growing upon his hop-

hop-poles might not be damaged, but might be gathered and carried away by the plaintiff for his own use within a convenient time; that he gave the plaintiff notice that he had divided, separated, set out, and left the said respective tenth parts from the nine parts thereof to his own use for the tithes of the said hops and binds; and that he took and carried away the other nine parts of the said hops growing on his said hop-grounds in the year 1751; and he insisted, that that manner of setting out the said tithes was the only method by which the tithe of hops ought to be set out by law. He admitted that the plaintiff had not carried the same away so set out, but had let the same lie and rot on his said land; and that he had brought his action of damages against him: and he insisted, that the tithe of hops ought not by law to be set out after they are picked from the bind or stem, but in the manner aforesaid. He denied that there was any custom in either of the said parishes for setting out the tithe of hops, but that, for the short space of time that hops had been planted in the parish of *Dorking*, a satisfaction had been usually made to the vicar after the rate of 10s. an acre, and in many parishes 12s. an acre; and that the plaintiff's predecessor had, at his own costs, caused to be picked from the binds or stems the tenth of the hops growing in the said parish of *Mickleham*, or satisfied the occupiers of the hop-grounds for the picking of them. He denied that he knew that the tithe of hops had in any instance, when set forth in kind, been set forth in either of the said parishes after the hops were gathered and picked from the binds or stems; and he set forth the quantities and values of the hops he had grown in the said year.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon hearing counsel; and reading the depositions of several witnesses; and a receipt signed by the plaintiff the 21st of *October* 1745; and upon full debate of the matter; the court declared, that the method of setting out the tithe of hops insisted on by the defendant in his answer, is no good setting out of his tithe of hops; but that hops ought to be picked and gathered from the binds before they are tithable; and therefore ordered the defendant to account for the value of his hops growing on his said lands in the parishes of *Mickleham* and *Dorking* from *Lady-Day* 1751, when gathered and picked from the binds; and to satisfy the plaintiff for the tithes thereof accordingly, with his costs of this suit to this time to be taxed; and that an injunction be awarded to stay the defendants said proceedings

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proceedings at law: the consideration of future costs, and all further directions, to be reserved until after the report.

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From this decree, Mr. *Tyers* appealed to the House of Lords, setting forth that the manner of setting out the tithes, by the admeasurement of the hops in baskets, would be very prejudicial and inconvenient to both parties, as the hops by that means would be necessarily bruised, the flower and condition thereof hurt, and the hops thereby very much damaged; that it hath been usual of late years, for hop planters to direct their gatherers to pick or assort their hops into different pokes, according to their different degrees of fineness and colour, to wit, the fine and the brown; and such assortment is the most material and expensive part of the manufacturing of hops, thrice as much time and expence being required in picking and assorting hops into two different parcels, as is necessary in picking them into one poke, when first gathered; and that it is unreasonable, that persons claiming tithes should have the benefit of this part of the manufacture of hops, which costs about 5l. an acre, without making any allowance, or contributing any share to the expence, and praying relief, for these (amongst other reasons):

First, There is no positive law to regulate the manner of tithing hops, neither is it fixed by immemorial usage or custom; the determinations of courts relating thereto have been various; and therefore that manner of tithing seems most just and equitable, which is both the least prejudicial to the owner, and most beneficial to the parson or impropiator.

Secondly, The manner insisted on by the respondent, by picking and then setting out the tithes by admeasurement in baskets, is so very detrimental to the planter, that it must inevitably be the ruin of the plantation of hops, the cultivation whereof is of extensive benefit to this kingdom. The method insisted on by the appellant is undeniably fair and equitable, not liable to any fraud whatsoever; whereas the method insisted on by the respondent is avowedly oppressive and injurious, in no wise productive of any benefit, or preventive of any fraud.

Mr. *Walton* the respondent hoped the decree would be affirmed (amongst other reasons) for these following:

First, The setting out the tithe of hops by measure, after they are picked from the bind or stem, is the surest and most equal method,

method, and liable to the least inconveniences ; whereas the method of tithing contended for by the appellant, by every tenth hill, would be liable to great fraud, inasmuch as the planter of hops would have a right to set out for tithe every tenth hill, to be computed from the place he began at ; and he might any year determine before he manured his hop ground, where he would begin to set out the tithe, and thereby would certainly know every tenth hill through the whole plantation, and might neglect to manure or improve them so much as the other hills, which would be unjust and unreasonable.

Secondly, The method of tithing contended for by the appellant, would give occasion to many disputes and controversies ; as the hops growing in one hill are apt naturally to intermix with the hops growing on the hills adjoining, so that it is scarcely possible to sever the one from the other entire ; and the owner of tithe, or his agent or servants, exercising the right of entering into the hop-grounds, and pulling up the planter's poles, must frequently furnish matter for suits and vexations ; which would be inconvenient both to the owner of the tithes, and to the parishioners.

Thirdly, The appellant hath not made the least proof, that the tithe of hops was ever set out before they were picked from the bind or stem, or that they were tithed by the tenth hill (which is the method of tithing the appellant contends for) ; but on the contrary, in many instances, where the method of setting out tithe-hops has been disputed or brought in question, it has been uniformly determined and adjudged, after solemn argument, that the tithe of hops by law, ought to be set out by measure, after they are picked from the bind or stem ; and the decree was affirmed by the lords.

Tr. 26 & 27 Geo. II. A. D. 1753. Scac.

Hilton v. Heath. [2 Wood's Decr. 476.]

THE impropiator of *Lyneham* claimed all tithes in the villages of *Lyneham*, *Bradstock*, and *Clack* ; and prayed an account for the same.

The defendant put in his plea and answer, and by protestation, not acknowledging or confessing, &c. as to so much of the bill

The defendant answers by protestation as to,

the prayer of discovery and account;

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and for plea says, that he agreed for his tithes with the agent of the former and present impropriator at 8l. a-year, and that the plaintiff had not given notice to determine the said agreement;

and, setting forth an account, tenders 4 l. for the last half-year;

which the plaintiff refuses to accept.

as prayed a discovery of the several tithable matters and things, or any of them, which had grown or arisen on the lands and premises within the parish or impropriate rectory of *Lyneham*, or the tithable places thereof, at any time before and unto *Michaelmas* 1747, or the quantities, qualities, or values thereof, or any account or satisfaction for the same, or any part thereof, pleaded thereto; and for plea said, that one *J. Hulbert* being employed and duly empowered by one *Mary Walker*, then reputed owner and impropriatrix of the said rectory of *Lyneham* and the tithes thereto belonging, as her agent or servant, to collect and receive for her use the tithes and dues arising from the said rectory, and to let the same, and receive the rents and compositions due for the same, he, the defendant, about the 17th of *June* 1736, entered into an agreement with the said *Hulbert* in writing to pay annually 7l. 10s. for his tithes of corn and grass, together with the small and privy tithes; that he, the defendant, renewed the said agreement with *Hulbert* who acted as the plaintiff's agent when he came into possession thereof; and that he had duly paid for all his said tithes according to that composition, and had continued to go on so yearly, at the rate of 8l. a-year for the same; and therefore he pleaded the said agreement; and he set forth the lands he occupied, and the tithable matters that arose thereon; and insisted, that he ought not to pay them in kind, the said plaintiff not having given him due notice that he would no longer abide by the said agreement; and he tendered the 4 l. the half-yearly payment then due, which the said *Hulbert* refused to accept, declaring that he would not abide by the said composition.

The plea was argued, and ordered to stand for an answer, but without liberty to the plaintiff to take exceptions to the same.

The plaintiff replied to the plea and answer; the defendant rejoined; and witnesses were examined on both sides.

The court, upon hearing counsel, and reading the several proofs in the cause, and the several agreements and receipts from *J. Hulbert*, particularly mentioned and insisted on in the plea and answer, ordered the bill, as against the defendant *Heath*, to be dismissed with costs.











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